EDITOR'S NOTE

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o. 85-559-CFX
tatus: GRANTED

Title: Paul H. Coplin, et ux., Petitioners
v.
United States

ocketed:
eptember 30, 1985

Court: United States Court of Appeals for the Feceral Circuit

ide:
85-558
85-560

Counsel for petitioner: barnard, Andrew C.

Counsel for respondent: Solicitor General

ntry	Date	Note	Proceedings and Orders
1	Sep 30 1985	G	Petition for writ of certiorari filed.
2	Sep 30 1985		Appendix of petitioner Paul Coplin, et ux. filed.
4	Nov 4 1985		Order extending time to file response to petition until November 30, 1985.
5	Nov 29 1985		Order further extending time to file response to petition until December 6, 1985.
6	Dec 3 1985		Brief of respondent United States in opposition filed. VIDED.
7	Dec 4 1985		DISTRIBUTED. January 10, 1986
8	Dec 27 1985	X	Reply brief of petitioners Paul Coplin, et ux. filed. VIDED.
9	Jan 13 1986		Petition GRANTED. The petition for a writ of certiorari is granted. The cases are consolidatec anc a total of one hour is allotted for oral argument.
11	Jan 28 1986		Order extending time to file brief of petitioner on the merits until March 22, 1986.
12	Feb 10 1986		Record filed.
13	Feb 10 1986	G	Motion of petitioners to dispense with printing the joint appendix filed.
14	Feb 24 1986		Motion of petitioners to dispense with printing the joint appendix GRANTED.
15	Mar 22 1986		Brief of petitioners Paul Coplin, et ux. filed.
17	Apr 24 1986		Order extending time to file brief of respondent on the merits until May 26, 1986.
18	May 27 1986		Brief of respondent United States filed. VIDED.
19	Jul 15 1986		CIRCULATED.
20	Jul 28 1986		SET FOR ARGUMENT. Tuesday, October 14, 1986. (1st case). This case is consolidated with Nos. 85-558 & 660.
21	Jul 28 1986		(1 hour).
22	Oct 3 1986	X	Reply brief of petitioners Paul Coplin, et ux. filed. VIDED.
23	Oct 6 1986		Letter from Justice Dept. received and distributed.
24	Oct 14 1986		ARGUED.

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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1985

PAUL H. COPLIN and
PATRICIA COPLIN,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether the following language of Article XV(2) of the Implementation Agreement to Article III of the Panama Canal Treaty of 1977 is clear and definite in granting a bi-national tax exemption to U.S. citizen employees of the Panama Canal Commission?

> "United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission."

2. Whether the appellate court can rely on an *extra-record* diplomatic note of questionable reliability to reverse a well reasoned forty-six page trial court opinion which found that the above language clearly granted a bi-national income tax exemption to U.S. citizen employees of the Panama Canal Commission?

3. After informing the trial court that Panama's interpretation of the above language was of 'little value' and of 'little relevance' and after refusing to provide the trial court with evidence of Panama's interpretation, can the United States government (a party litigant with a substantial financial interest) subsequently submit evidence of questionable reliability at the appellate level purporting to demonstrate Panama's interpretation of the above language?

4. Was it improper for the appellate court to take judicial notice of that evidence filed by the United States just one day before oral argument?

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NO.

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OCTOBER TERM, 1985

PAUL H. COPLIN and
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION

The Petitioners Paul H. and Patricia Coplin respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on May 10, 1985, which reversed *Coplin v. United States*, 6 Cl.Ct. 115 (1984) and the order denying the Petitioners'

Petition for Rehearing entered in this proceeding by the United States Court of Appeals for the Federal Circuit dated July 3, 1985.

OPINION BELOW

The opinion of the Court of Appeals as reported in *Coplin v. United States*, 761 F.2d 688 (Fed. Cir. 1985), *rev'g*, 6 Cl.Ct. 115 (1984), appears in the Appendix filed separately. The opinion of the United States Claims Court as reported in *Coplin v. United States*, 6 Cl.Ct. 115 (1984), also appears in the Appendix filed separately. These opinions, and an opinion of the United States Court of Appeals for the Eleventh Circuit in *Ralph Harris and Joan Harris v. United States*, 768 F.2d 1240, are reprinted in the appendix submitted concurrently herewith by the parties below. These cases involve identical or closely related questions sought to be reviewed on certiorari to the same court. Other petitioners whose cases were consolidated with the *Coplin, Supra.* appeal have joined in this appendix upon their peititions for certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on May 10, 1985. A timely filed petition for rehearing was denied on July 3, 1985, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, TREATY PROVISIONS AND STATUTES INVOLVED

Panama Canal Treaty Between the United States of America and Panama, September 7, 1977, 33 U.S.T. ____, T.I.A.S. No. 10029 (Hereinafter "Treaty"):

> Article III, Paragraph 9 states:
> The rights and legal status of the United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

Agreement Between the United States of America and Panama in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, 33 U.S.T. ____, T.I.A.S. No. 10030 (Hereinafter "Implementation Agreement"):

> Article XV paragraph (2) states:
> 2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

U.S. CONST. amend. V (Due Process Clause):

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . .

U.S. CONST. art. VI, cl. 2 (Supremacy Clause):

> This Constitution, . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . .

F.R.A.P.Rules 10(a) and 30(a), 28 U.S.C.A.

> Rule 10 (a):
> . . . The original papers and exhibits filed in the district court . . . shall constitute the record on appeal in all cases.
>
> Rule 30(a):
> . . . The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record . . .

STATEMENT OF THE CASE

The Panama Canal Treaty of 1977 between the United States and the Republic of Panama went into effect on October 1, 1979. The Treaty was controversial in both countries and negotiations were heated. The Treaty changed a unique relationship between the two countries that began in 1903.[1]

[1]In 1903 the United States recognized the newly formed nation of Panama and a few days thereafter entered into a treaty to build the Panama Canal. That treaty granted the United States rights in perpetuity to construct and operate a Canal within a zone 10 miles wide crossing Panama over which the United States would exercise rights, powers and authority as if it were the sovereign.

This case concerns the interpretation of clear language in the Implementation Agreement to Article III of the Panama Canal Treaty. The language in issue, which was written by the government says:

* * * *

(Footnote 1 Continued)

That 50 square mile area surrounding the Canal was known as the Canal Zone: an exclusive self-sufficient area with its own civil government. The Canal Zone existed in the middle of Panama and literally bisected the country with entrances on each coast. Panamanians who wished to travel the breadth of their country had to enter the Canal Zone and in doing so were subject to the Canal Zone laws, police, courts and jails. The building of the Panama Canal, which was an engineering marvel, and the highly efficient operation of the Canal and Canal Zone, are monuments of pride to the United States. However, Panamanians have always felt mixed emotions about a foreign power occupying 50 square miles of their best land. Often, those emotions would tend towards frustration and resentment against the United States. The sovereign rights granted in perpetuity to the United States were not acceptable to Panama.

In 1964 rioting broke out on the Canal Zone border and diplomatic relations were broken. The United States realized that a new treaty was necessary. The 1977 Panama Canal Treaty was the culmination of negotiations that began in 1964.

In 1976, President Carter stepped up negotiations for a new treaty with Panama. The individuals chosen to represent Panama on its negotiating team were working towards possibly the greatest historical event of their country—the retrieval of total sovereignty. The negotiating process riveted the attention of the people of the Canal Zone and Panama through 1977 and 1978. The Treaty, which relinquished the sovereign rights exercised by the United States over the Canal Zone to Panama, was accepted and ratified by each country's legislative body. At midnight, October 1, 1979, the new Treaty went into effect and the first official act of Panama was to raise a huge national flag over Ancon hill, a prominent elevation visible throughout Panama City.

2. *United States Citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission.* Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama. (Emphasis added).

Paragraph 2, Article XV, Agreement between the United States of America and Panama in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, 33 U.S.T. ____, T.I.A.S. No. 10030

* * * *

The gist of the controversy in this case is that the government maintains that this language does not mean what it says. The petitioners contend that this language, by its own express terms, exempts U.S. citizen employees of the Panama Canal Commission from U.S. income taxation. This action and many others have arisen because of the government's position.

A. The Negotiations And Taxation As An Issue

The negotiating transcripts produced at trial show that a sovereignty issue arose over Panama's right to tax the salaries of the U.S. employees of the Commission.[2]

[2]In June of 1977, negotiations were proceeding on the taxation issue. Panama's position was that the operation of the Canal was essentially a commercial activity. Accordingly, it wanted to exercise its sovereign right to tax all employees of the entity operating the Canal. The United States did not want to establish a precedent

Panama viewed the right to tax the income of the U.S. employees as an authority created by its retrieval of sovereignty over the Canal Zone. The United States negotiating team was opposed to taxation by Panama because it would create an undesirable precedent for other United States Government operations overseas and would make it more difficult to obtain the Senate's advice and consent. There were many vocal Treaty opponents in the United States.

The transcripts indicate that the two teams discussed this tax/sovereignty issue numerous times and that their positions hardened as the Treaty completion deadline neared. During the dispute, the U.S. team made four drafts of Article XV; the difference between the first and last drafts was that the reference to Panamanian law was deleted. Only the final draft was presented to the Panamanian delegation. There is a gap in the

(Footnote 2 Continued)

where employees of a United States Government agency would be taxed by a foreign sovereign. This might cause problems in negotiations with other countries. The negotiations were deadlocked. Neither signatory could agree on this issue. It was clear to the State Department that this was a sovereignty issue with minor economic results in the eyes of the Panamanians. It was not simply a matter of money.

As the negotiations progressed, the taxation issue became a greater problem as the sovereignty issue became more sensitive and heated. The trial court held that Panama ultimately agreed to the language in a good faith compromise of its position feeling that the United States was likewise compromising. Neither country would tax the employees.

negotiating transcripts[3] from July 19, 1977, to the last meeting in August of 1977, when the United States and Panama agreed to the exemption language then presented. The affidavit of Dr. Carlos Lopez Guevara, the Panamanian negotiator of this tax provision, shows that Panama accepted it as a bi-national tax exemption. The affidavit is part of the *Coplin* record.

After the exemption language was accepted by Panama and approved by a Panamanian plebiscite pursuant to the Panamanian Constitution, the United States Department of State told the United States Senate, the United States employees of the Commission and numerous United States courts that Article XV(2) exempted the United States employees from Panamanian taxation only and was not reciprocal. However, there is no evidence that the U.S. government informed Panama of this different interpretation.

The following excerpt from the colloquy between Senator Richard Stone and the former legal advisor to the Department of State, Herbert Hansell, during the Senate Foreign Relations Committee Hearings in 1977, illustrates the attention that this tax exemption clause received.

* * *

[3]The Government has admitted that incomplete records of the negotiations were kept by the U.S. team. A confidential position paper dated May 3, 1977, is in evidence which describes the American position and objectives. However, there is nothing which tells us about the Panamanian position other than the language of the provision at the time the treaty was signed.

SENATOR STONE: . . . *Of course, when that was announced, the press reported the glee of the Zonians that they were now exempt from U.S. income tax. . . .*

* * *

SENATOR STONE: *Wouldn't you think that we could put in the understanding that I suggested to you, the clarification of our interpretation which then, when ratified by the Congress, by the Senate, and deposited, would clarify that in a little more formal way than simple advices, since you don't want to put words back in the treaty through negotiation?*

MR. HANSELL: The one comment I would have with respect to that, and this relates to a couple of other points, is that we are dealing now with an internal U.S. matter, not a matter between the United States and Panama. That is, we don't agree with Panama how we are going to tax our citizens. That is obviously an internal matter. *I would hope we could find ways of dealing with internal matters other than as understandings.*

SENATOR STONE: You understand that if the Zonians want to try to exert their exemption from U.S. taxes that *you will be in for some lawsuits. I just wanted to figure out a way to avoid that.*

> MR. HANSELL: That would not be a lawsuit that I would want to undertake on their behalf, but *we will find a way to avoid this.*

Panama Canal Treaty, Hearings Before the Committee on Foreign Relations, United States Senate, on Executive FN, 95th Cong., 1st Sess. (Part I) pp. 268-269 (1977). (Emphasis added).

The exemption language in question became the focus of discussion in Panama and the Canal Zone. The local newspaper ran articles on it. The colloquy significantly points out the Department of State's refusal to 'clarify' its intent by means of an understanding. If the Panamanians were in agreement with the government's restrictive interpretation, why did Mr. Hansell not welcome Senator Stone's suggestion to correct the problem by means of an understanding? The only logical answer is that the government knew Panama was not in agreement with its interpretation and could not agree to it unless the Implementation Agreement was amended and reapproved by a Panamanian plebiscite. The government must have known that bringing this issue to the attention of the Panamanian government would have required a renegotiation of that provision, and probably others. The Department of State never fulfilled its promise. Hundreds of lawsuits have resulted.

B. The Proceedings Below:

This lawsuit began in August of 1981. Petitioners (hereinafter "Taxpayers"), relying on the foregoing language, filed an action in the United States Court of Claims for a refund of taxes paid during the last quarter

of 1979.[4] Although the language is in the Implementation Agreement, it was an integral part of the treaty by its reference in paragraph 9 of Article III of the Panama Canal Treaty, T.I.A.S. No. 10030.

After years of frustrating discovery caused by the government's reluctance to declassify relevant information on the negotiating history, the case came up for hearing on cross motions for summary judgment on February 23, 1984, before Chief Judge Alex Kozinski. During that hearing, the court expressed grave concern that the government failed to produce any evidence at all rebutting the clear language of the provision. The court told the parties that the evidence clearly supported the taxpayers. It postponed ruling on the motions for two weeks in order to allow the government time to supplement the record before ruling.

Two weeks later, the motions again came up for hearing. Government counsel indicated that it did not believe that there was anything else it could produce to supplement the record and that it was ready to rest its case. The court was alarmed. It invited the government's counsel to return at 2:00 p.m. with her

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[4]There were approximately 4,000 U.S. citizen employees who were working for the Panama Canal Commission on October 1, 1979. Presently, there are approximately 1,300 U.S. citizen employees. Information from the payroll department of the Panama Canal Commission indicates that approximately $416,000,000.00 has been paid in salaries to U.S. citizens from October 1, 1979, to date. The amount of taxes plus accrued interest for all U.S. citizen employees involved is conservatively estimated to be $110,000,000.00. As more U.S. citizens retire from or leave the Commission's employ and are replaced by Panamanians, the salaries and tax impact will continually scale down.

superior and someone from the Department of State to explain the apparent lack of importance the government attached to the case. The court again told the parties that the record did not support the government's position and that it was unlikely that the government would win on the existing record. Judge Kozinski told the parties that he believed the other courts that had decided this case had not examined the record as closely as he had.

At 2:00 p.m., the motions were again called up for hearing. Government counsel appeared with her immediate superior, but no one from the Department of State attended. Even after repeated requests by the court and after advising the government that the record supported the Taxpayers, government counsel steadfastly refused to supplement the record with any evidence to support its position. The court offered again to postpone the hearing for as much time as the government would need to acquire more evidence; however, the government counsel insisted that the case be decided on the record as it then existed. Significantly, the government mentioned that any evidence from Panama at that stage of the litigation would not be persuasive. The court noted that such a submission would not be dispositive, but it would be considered by the court before ruling on the motions.

Chief Judge Alex Kozinski ruled from the bench in favor of the Taxpayers. Five months later, he issued a forty-six page opinion supporting his judgment with numerous citations to the record.

On November 30, 1984, the government filed its opening brief in its appeal to the Federal Circuit Court of Appeals. In its brief, it stated that "the Panamanian interpretation would be of little relevance," and that "consulting the Panamanian Government in this case would have been of little value." The basis of its argument on appeal was that only its unilateral interpretation of treaty language was controlling, regardless of the clear language. In essence, the government still insisted that the treaty did not mean what it clearly says.

In October, 1984, a new administration came into power in Panama. On December 24, 1984, the United States gave the Republic of Panama 30 million dollars which the United States Ambassador characterized as "unprecedented" in either country's history. In February, 1985, the government, who previously insisted that such evidence was of "little value", suddenly received a telegram from the Minister of Foreign Affairs of Panama with letters from three former Panamanian treaty negotiators (who were not involved in any negotiations of Article XV(2) of the Implementation Agreement). The translated version of the letters and the accompanying telegram from the then Panamanian Minister of Foreign Affairs indicated that now, contrary to the laws of its own county,[5] the Republic of Panama does not think the treaty means what it says either. None of the letters or the interpretation that they

[5]On September 19, 1985, the dean of the University of Panama law school, Dr. Edgardo Molino Mola, executed an affidavit in which he concluded that the diplomatic cablegrams from Panama dated February 22, 1985, were illegal under the Constitution of Panama. That four page affidavit will be referred to and incorporated in Petitioners' opening brief if a writ is issued.

manifested have been approved by a Panamanian plebiscite as required by Panamanian law.

On March 1, 1985, just one working day before the appellate oral argument, the government filed its reply brief and attached the cablegrams with translations to it as an 'appendix'. No previous notice was given to Appellees and no other pleading requesting the Court of Appeals to accept such papers was filed by the government. Additionally, no explanation of how the cablegram was acquired was given to the court by the government.

On March 4, 1985, Taxpayers filed a joint motion to strike the proffered appendix informing the court of the 30 million dollar transaction with the new administration, and prior statements made by the Foreign Minister during public discussions which were inconsistent with the substance of the telegrams. The motions also noted the incompetence of the three individuals who had no direct involvement in the negotiation of the provision, and the due process problems that such a submission creates.

The only explanation offered by the government for abandoning its prior position was that diplomacy could not be artificially limited by the time frames of litigation. The government stated that it previously did not have sufficient opportunity to acquire the note and submit it during the trial proceedings. This representation was erroneous because the government had refused the repeated requests for more information made by the Claims Court. During oral argument, the government conceded that the case could be decided on the record made in the Claims Court without reference to the cablegram.

The Court of Appeals denied the motions to strike and reversed the Claims Court on May 10, 1985. Taxpayers and two other appellees filed Petitions for Rehearing relying on the record made in the Claims Court and the due process problems raised by the government's actions. The three Petitions for Rehearing were denied on July 3, 1985.

In a later case involving the same issue in the Eleventh Circuit, *Harris v. United States*, 768 F.2d 1240 (11th Cir. 1985) the Court of Appeals rejected the same materials filed by the government in the *Coplin* appeal noting:

> "we shall not consider the challenged material and we reject the government's suggestion that self-serving evidence outside the record, for which additional explanation is required, can be considered by this court."

The court noted that the government agreed during oral argument that the *Harris* case could be decided on the record without any reference to these late filed materials. The Eleventh Circuit ruled that U.S. citizen employees were exempt from U.S. income taxation on their Commission salaries by virtue of Article XV(2).

Thus, this application for Certiorari is made to review the rulings of the Court of Appeals for the Federal Circuit which undermine due process guarantees and established treaty interpretation authority. Specifically, Petitioners seek a writ for a review of the Federal Circuit's denial of their motions to strike, petitions for rehearing and the reversal of the well considered and thorough opinion of the Claims Court.

The following is the basis for federal jurisdiction in the court of first instance, the United States Claims Court. This tax refund action was authorized under 26 U.S.C. Sec. 7422(f), and jurisdiction was properly vested in the United States Court of Claims under 28 U.S.C. Sec. 1346(a) which subsequently became the United States Claims Court pursuant to the Federal Courts Improvement Act of 1982, Pub.L. 97-164, Apr. 2, 1982, 96 Stat. 25.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE ELEVENTH CIRCUIT COURT OF APPEALS DECISION IN *HARRIS V. UNITED STATES* AS TO THE PROPER INTERPRETATION OF THE LANGUAGE OF ARTICLE XV OF THE IMPLEMENTING AGREEMENT TO ARTICLE III OF THE PANAMA CANAL TREATY AND ON HOW *EXTRA RECORD* MATERIALS SHOULD BE TREATED IN AN APPELLATE PROCEEDING.

The decision of the Court of Appeals for the Eleventh Circuit in *Harris v. United States*, 768 F.2d 1240 (11th Cir. 1985) directly conflicts with the decision of the Federal Circuit in the instant case in two major areas. First, the two courts directly disagree on the interpretation of the plain language of the Implementation Agreement. Second, the two courts are divided on how *extra record* materials should be treated in an appellate proceeding. These direct conflicts were noted by the Eleventh Circuit in its opinion made a part of the separately bound joint appendix filed concurrently herewith.

A. The Clear Language and The Irreconcilable Interpretations.

Unlike the Federal Circuit, the Eleventh Circuit, by affirming the Southern District Court of Georgia in *Harris v. U.S.*, 585 F.Supp. 862 (1984), decided that the plain language of the Implementation Agreement conferred reciprocal tax exemptions to the U.S. citizen employees of the Commission. The Eleventh Circuit left the district court's reasoning undisturbed. In examining the record after rejecting the late submission of the diplomatic note, the Eleventh Circuit drew the same conclusions reached by the Claims Court whose opinion is contained in the separate appendix. *Coplin v. U.S.*, 6 Cl.Ct. 115 (1984) *reversed at* 761 F.2d 688. The Eleventh Circuit's careful analysis of its record revealed that the negotiating history supported the reciprocal tax exemption interpretation rather than the restrictive meaning placed upon the language by the government. In essence, the record reveals facts about this case that paint a far more complex scenario than that suggested by the government and blindly accepted by the Federal Circuit Court of Appeals.

The Eleventh Circuit followed the premise that international agreements, while possessing the force and effect of law, should be construed more like contracts than statutes. *See Santovincenzo v. Egan*, 284 U.S. 30, 40, 52 S.Ct. 81, 84, 76 L.Ed. 151 (1931); *Tucker v. Alexandroff*, 183 U.S. 424, 436 (1902). The government attempts to impart ambiguity to and contradict the plain meaning of Article XV(2). *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982) states that "[w]hen the parties to a treaty both agree as to the meaning of a

treaty provision, *and that interpretation follows from the clear treaty language*, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." (Emphasis Added).

Only when language is susceptible to differing interpretations, extraneous materials bearing on the parties' intent should be considered. *Hidalgo County Water Control and Improvement District v. Hedrick*, 226 F.2d 1, 8 (5th Cir. 1955), *cert.denied*, 350 U.S. 983, 76 S.Ct. 469, 100 L.Ed 851 (1956). A party should not be allowed to abuse the rules to impart an ambiguity where none exists, *see National Surety v. McGreevy*, 64 F.2d 899 (8th Cir. 1933); especially when any ambiguity should be construed against that same party who drafted the language. Restatement (Second) of Contracts, Sec. 206 (1979).

In this case, the language of Article XV(2) is clear and unambigious and that should be the focus of any court's scrutiny.

The Eleventh Circuit first examined the language of the provision in issue. It noted that the district court, like the Claims Court, found it to be "unmistakably clear", *Harris*, 585 F.Supp. 862. It also found that Paragraph 2 of Article XV of the Implementation Agreement speaks in "clear and sweeping terms." The language explicitly states that U.S. citizen employees of the Panama Canal Commission *"shall be exempt from any taxes*, fees, or other charges on income received as a result of their work for the Commission". (Emphasis Added).

In contrast, the majority opinion in *Coplin, Supra.* ignored the first rule of treaty interpretation, i.e. it

must review the language for clarity. To illustrate the contrast, the Federal Circuit failed to make any reference to the pre-supplemented record to justify reversing the Claims Court's findings. It simply concluded that "[s]ince both treaty parties agree that paragraph 2 was not intended to create an exemption from United States domestic taxation, the trial court's decision cannot be upheld", *Coplin v. United States*, 761 F.2d 688, at 692. It made no comment on the clear language, or the evasive and misleading representations of the State Department during the ratification process. The Federal Circuit relied on the diplomatic cablegrams in its deliberations. However, those cablegrams have recently come under the scrutiny of an expert in Panamanian Constitutional law who found them to be illegal. *See fn.* 5, *Supra.*

In a separate concurring opinion, the Federal Circuit recites that it examined the record without benefit of the diplomatic note and concludes that the exemption language had "no relevance to taxation by the United States of its own citizens". Instead of referring to specific portions of the record to support its judgment (because such support does not exist), the court judicially changed the title of Article XV(2) from "Taxation" to "Panamanian Taxation." This is contrary to several Supreme Court Rulings.

> "It is our duty to interpret [a treaty] according to its terms. These must be fairly construed, but we cannot add to or detract from them." *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 11 (1936).

Words in a treaty "* * * are to be taken in their ordinary meaning * * * and not in any artificial or

special sense impressed upon them by local law." *Geofroy v. Riggs*, 133 U.S. at 271; *accord Santovincenzo v. Egan*, 284 U.S. at 40; *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. at 180. "Interpretation of [a treaty] must, of course, begin with the language of the Treaty itself." *Id.* Petitioners believe that such action is an abuse of judicial discretion that can only be corrected by competent review. There is no need to go beyond clear treaty language to understand it.

B. The Motions To Strike.

In *Harris, Supra.*, the Eleventh Circuit granted the Appellees' Motion to Strike the late filed diplomatic note. It rejected the government's argument that such a supplement can be made. The court limited itself to reviewing the record set in the trial court. Its decision was based on well established precedents existing in the Fifth Circuit and its own court. The Eleventh Circuit also noted, in a footnote, the suspicious circumstances surrounding the acquisition of the diplomatic note and the 'strangely identical' nature of the letters upon which it was based.

In contrast, the rulings by the Federal Circuit conflict with well established canons of treaty construction, the rules of Appellate Procedure (F.R.A.P.Rules 10 and 30, 28 U.S.C.), and the Federal Rules of Evidence, Rule 201, 28 U.S.C. The Appellate Rules indicate that the record consists of only items filed in the trial court and the appendix consists of only items originating from the record. Federal Rules of Evidence, Rule 201, 28 U.S.C. indicates that judicial notice is proper only where the reliability of a particular piece of evidence is unquestionable. Additionally, sufficient notice and an

opportunity to be heard must be afforded to all parties in order to contest it.

Petitioners suggest that the note's content is unreliable as evidence given the special political, economic and financial relationship between the governments of the United States and Panama. There is no need to show a direct causal relationship between the note's production now, after several years of litigation, and the 30 million dollar unprecedented donation from the United States to Panama made December 24, 1984. The donation simply illustrates the nature of the relationship between the two governments. It is this relationship, not necessarily the donation itself, which taints the note.

The *Coplin* appellate court relied on *Sumitomo Shoji America, Inc. v. Avagliano, Supra.* to support its consideration of the diplomatic note. It also cited *Factor v. Laubenheimer*, 290 U.S. 276, 54 S.Ct. 191, 78 L.Ed. 315, *United States v. Reynes*, 50 U.S. (9 How.) 127 (1850) and *Jones v. United States*, 137 U.S. 202 (1890). None of these cases are applicable precedent for allowing contradictory statements to supplant clear treaty language which was ratified without any reservation or understanding to restrict its meaning. In all four of those cases, the materials which those courts took judicial notice of were unquestionably reliable. In this case, the reliability of the diplomatic note is in question and the Eleventh Circuit refused to consider it.

Additionally, in *Sumitomo*, the government had intervened as *amicus curiae* in order to preserve harmonious relations with Japan. In this controversy,

the government is the defendant with a direct financial stake in the litigation. Its reading of Article XV(2) has been challenged by the affected taxpayers since the inception of the Panama Canal Treaty. This factual basis significantly erodes the reliability of documents obtained outside the record, especially when the litigant refused to introduce or even attempt to acquire such evidence in the trial court after repeated invitation.

The Federal Circuit's reversal injects turmoil into the established rules of treaty interpretation. It also undermines the rules of Appellate Procedure and the Federal Rules of Evidence.

This conflict between the circuits on the proper interpretation of Article XV of the Implementation Agreement affects hundreds of people working for the Panama Canal Commission. The rules of construction for treaty interpretation are placed in jeopardy and confusion, which, in turn, jeopardizes the honor of our government who is charged with recognizing and protecting the rights conferred by such agreements. *See Chew Heong v. United States*, 112 U.S. 536, 540, 5 S.Ct. 255, 256, 28 L.Ed. 770 (1884). Firm guidelines for proper treaty construction rules can be established only through a resolution by this Court of the questions presented herein.

2. THE DECISION BELOW CREATES SERIOUS DUE PROCESS PROBLEMS THAT DIRECTLY THREATEN A CITIZEN'S RIGHT TO A FAIR REVIEW.

When treaty language is crystal clear, it is fundamentally unfair to restrict its effect by judicially limiting its meaning by relying on *extra record* evidence that is suspect and unreliable. It is a fundamental principle of democratic governments that people are governed by written laws rather than the whims of persons in power.

In this case, taxpayers have prosecuted their case relying on language which clearly supports them. The government has been given numerous opportunities in the trial court to present evidence which supports its position. Instead of taking advantage of such opportunities, the government confused the issues by presenting questionable evidence. Further, it took a litigating position in the trial court that evidence of Panama's intent would be of little, if any, value and would certainly not be dispositive of the case. The lower court recognized this issue and advised the government that such evidence might be worthy of consideration even though it would not be dispositive. Without warning, and at the last possible moment in the appellate proceedings, the government reversed its litigation stance and submitted documents which are "strangely identical" to one another and which were acquired shortly after Panama became the beneficiary of a large economic gift from the United States. The action of the Federal Circuit, in accepting the untimely documents as dispositive, literally usurps the trial court of its function and duty to make an interpretation.

The essence of the due process problems presented by this scenario is easily shown. If such evidence had been presented at trial, taxpayers would have had an

opportunity to present other evidence attacking the credibility and legality of the government's submission. However, by its actions, the appellate court has denied this opportunity to the taxpayers. Taxpayers have been deprived of their day in court.

Other due process problems focus on basic fairness. Can the government's interpretation controvert language which is crystal clear by itself and needs no interpretation? Can the appellate court disturb the findings of the lower court without pointing out the error or errors allegedly made in the lower court's reasoning?

The government advanced the proposition in the past that the Article XV language was inartfully drafted by its negotiating team. It implied that the language was the result of a mistake ignoring the fact that at least three separate drafts were made, each containing substantive amendments. The U.S. negotiating team was a distinguished and experienced group. It refused to take any opportunities to amend or clarify its interpretation long before the treaties were ratified. On at least two separate occasions, before ratification, an amendment was recommended: first, by an agency within the Executive Branch and then by Richard Stone of the U.S. Senate. These recommendations were rejected. All of these arguments were thoroughly addressed by the lower court. None of them were addressed by the appellate court.

U.S. citizen employees of the Commission have relied on this unabridged tax exemption language in presenting their claims. However, instead of amending the troublesome language as it was asked to do, the government has taken the position that the language

simply does not mean what it says. The government has invoked the rules of construction to impart an ambiguity where none exists. Instead of resolving the issue, the government has clouded it. Relying on the plain language, taxpayers are misled by their own government who now seeks to amend the treaty judicially where it failed to do so diplomatically.

The government cannot be allowed to use such unrestrained power and unbridled discretion in interpreting treaties. Otherwise, the words and the treaties themselves become irrelevant. Such abuses of power should be reviewed to prevent an erosion of due process rights afforded individuals under the Fifth amendment and to prevent violations of the Federal Rules of Appellate Procedure. Only a review by the Court of the questions presented herein can resolve the conflict between the unrestrained use of the Executive Department's foreign relations power with the due process rights of individuals.

3. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING EFFECTIVE ADMINISTRATION OF TAX LAWS.

Settlement of the questions by this Court is in the public interest because petitioners' cases are representative of a problem confronting hundreds of taxpayers. Indeed, the very question raised here, and on which the Federal and Eleventh Circuits have divided, is presented in a number of cases now pending before the Foreign Operations District of the Internal Revenue

Service, the Appellate Division of the Internal Revenue Service, the collection division of the Internal Revenue Service, various other district offices of the Internal Revenue Service in different parts of the country depending upon where U.S. citizen employees of the Panama Canal Commission have filed their returns, the Tax Court, and other district courts throughout the country. The undersigned presently represents hundreds of taxpayers with claims pending in the United States Claims Court. Additionally, he has received hundreds of phone calls from interested potential litigants and attorneys bringing claims in other forums.

The question is essentially one of treaty interpretation. Petitioners contend the second paragraph of Article XV is unequivocally clear in its tax exemption language. When this language came to the attention of the Senate Foreign Relations Committee, Senator Stone suggested that an 'understanding' be attached to the instruments of ratification to clarify the interpretation that the Department of State represented to that committee. He immediately saw the multitude of lawsuits that such language would spawn if the United States attempted to restrictively interpret it. The Department of State let the suggestion slide by. This inexplicable departure from standard foreign relations procedure and practice can only evidence and underscore the fact that both the United States and Panama acquiesced to the reciprocal tax exemption evidenced by the clear language when it (the treaty) was approved by the Panamanian plebiscite and the U.S. Senate and ultimately ratified, unabridged.

Indeed, substantial litigation has resulted, and more is expected. Taxpayers are lured into court to assert

rights that are obvious on the face of the Implementation Agreement. Now, with a conflict in the Circuits, disparate tax treatment resulting solely from a fortuity of forum or circuit can be prevented only through the resolution by the Court of the questions presented.

CONCLUSION

For all of the above reasons, Petitioners submit that a review in this case is clearly warranted to resolve the conflict in the circuits, to establish the interpretation of Article XV(2) of the Implementation Agreement of Article III of the Panama Canal Treaty of 1977, to reinforce the rules of interpreting treaties and to protect the due process rights of the affected taxpayers. Accordingly, Petitioners pray that the Court issue a writ of certiorari to review the rulings of the United States Court of Appeals for the Federal Circuit.

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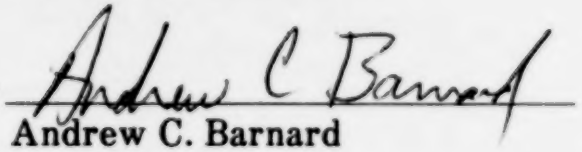
By 
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85-558 Nos. 85-559 85-560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT E. O'CONNOR and GLADYS E. O'CONNOR,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PAUL H. and PATRICIA COPLIN,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent.

JACK R. and MARIA R. MATTOX,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONERS' APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT.

MAY 10, 1985.

Appeal Nos. 85-504 to 85-507.

PAUL H. AND PATRICIA COPLIN,

Appellees,

V.

THE UNITED STATES,

Appellant.

ROBERT E. O'CONNOR, *et ux.*, GLADYS E. O'CONNOR,

Appellees,

V.

THE UNITED STATES,

Appellant.

JON D. COFFIN,

Appellee,

V.

THE UNITED STATES,

Appellant.

JACK R. AND MARIA R. MATTOX,

Appellees,

V.

THE UNITED STATES,

Appellant.

Taxpayers employed by the Panama Canal Commission filed suits for refund of federal income taxes. The Claims Court,

Alex Kozinski, Chief Judge, 6 Cl.Ct. 115, held that United States citizens employed by the Panama Canal Commission are exempt from United States income tax. Government appealed. The Court of Appeals, Bissell, Circuit Judge, held that the taxpayers were not exempt from United States domestic taxation in that the Panama Canal Treaty only exempted income earned by United States citizens from taxation by Panama.

Reversed.

Bissell, Circuit Judge, filed an opinion stating additional views in which Edward S. Smith, Circuit Judge, joined.

Nies, Circuit Judge, with whom Rich and Baldwin, Circuit Judges, joined, concurred with opinion.

Before RICH, BALDWIN, SMITH, NIES and BISSELL, Circuit Judges.

BISSELL, Circuit Judge.

The government appeals from a decision of the United States Claims Court holding that United States citizens employed by the Panama Canal Commission are exempt from United States income tax. We reverse.

BACKGROUND

These appeals were consolidated by order of this court dated October 22, 1984, and involve suits for the refund of federal income taxes. Paul Coplin, Robert O'Connor, Jon Coffin, and Jack Mattox are United States citizens and during the respective relevant tax years were employees of the Panama Canal Commission (Commission), an agency of the United States government. The wages they received from the Commission were included in computing their federal income tax for the years 1979 (Coplin and Coffin), 1980 (Mattox), and 1981 (O'Connor and Mattox). Based on their understanding of an international agreement, the taxpayers filed claims for refund for the amount of tax paid with respect to income received from the Commission. The Internal Revenue Service denied each of their claims and these suits followed.

On September 7, 1977, after years of negotiation, the United States and the Republic of Panama signed the Panama Canal Treaty, T.I.A.S. No. 10030. The Senate approved the treaty and it entered into force on October 1, 1979, restoring to Panama territorial sovereignty over the Canal Zone. Panama granted to the United States the right to manage, operate, and maintain the canal until the year 2000. During this period the canal is to be operated by the Commission. The treaty provides for increasing participation by the Republic of Panama in the management of the canal, in preparation for its assumption of full responsibility for the canal's operation when the treaty expires.

Because the Canal Zone would no longer be subject to United States territorial sovereignty, it was necessary to define the rights and legal status of the Commission and its employees vis-a-vis each country. These matters were to be governed by the Agreement Implementing Article III of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10031 (Implementation Agreement). The Implementation Agreement contains twenty-one articles governing such subjects as registration of vehicles, exemption from import duties, and criminal jurisdiction. Article XV thereof deals with taxation of the Commission and its United States citizen employees:

ARTICLE XV

TAXATION

1. By virtue of this Agreement, the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.

2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of

taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees and dependents shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

4. The Coordinating Committee may establish such regulations as may be appropriate for the implementation of this Article.

The dispute centers on the correct interpretation of the first sentence in paragraph two. The taxpayers claimed that, according to a literal interpretation, income earned by all United States citizens from the Commission was exempt from United States income taxation. The government contended that the provision was intended to bar only Panama, and not the United States, from taxing Commission employees. The court entered an order stating that all parties would be bound by relevant rulings in the Coplins' case. On cross-motions for summary judgment the Claims Court granted the Coplins' motion and denied the government's motion. *Coplin v. United States*, 6 Cl.Ct. 115 (1984). On the basis of Coplin, the court entered judgment for the taxpayers in all four cases on July 31, 1984.

OPINION

This court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(3). In reviewing a grant of summary judgment we determine whether there is no genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *D.M.I., Inc. v. Deere & Co.*, 755 F.2d 1570, 1573 (Fed.Cir.1985).

In the Claims Court the government argued that the treaty language should not be construed literally because to do so would do violence to the intention of the signatories. The court recognized that it should not give literal effect to treaty lan-

guage if it was persuaded that such language did not reflect the intention of the parties. *Coplin*, 6 Cl.Ct. at 127. The court observed that "the record is devoid of any statement of the official Panamanian position." *Id.* at 146. Despite government arguments that the literal language did not reflect the intention of the United States, the court construed the language literally because the government presented "*no evidence whatsoever* as to the interpretation given this language by Panama." *Id.* at 128, 145-47, 149 (emphasis in original).

On the morning of March 4, 1985, the day we heard oral argument in this case, the government's reply brief was delivered to the chambers of the panel members. In that brief the government informed the court that "[o]n February 25, 1985, the United States received a diplomatic note from the Panamanian Foreign Minister in which he confirmed that the Panamanian Foreign Ministry shared the United States' view that the Implementing Agreement was not intended to affect United States taxation of Commission employees." Reply Br. at 6. The Foreign Minister enclosed letters from the Panamanian team that negotiated the Implementation Agreement. In those letters the Panamanian negotiators confirmed that Paragraph 2 of Article XV was "discussed, negotiated and drafted exclusively with respect to the tax exemption that the Republic of Panama would grant to United States-citizen employees of the Commission and their dependents" and that the "provisions resulted from negotiations that did not deal with the United States[']authority to tax the individuals mentioned therein." *Id.* In an appendix to the brief the government included the cable from the United States embassy in Panama transmitting the diplomatic note and the accompanying letters to the State Department.

I. Motions to Strike

Later that morning the appellees filed motions to strike all of the documents in the appendix to the reply brief as well as all references to them in the text of the reply brief.

The general rule on supplementing the record with new evidence is that "appellate courts . . . can act on no evidence

which was not before the court below, nor receive any paper that was not used at the hearing." *Boone v. Chiles*, 35 U.S. (10 Pet.) 177, 208, 9 L.Ed. 388 (1836); *cf. United States v. Miller*, 80 U.S. (13 Wall.) 568, 576, 577, 20 L.Ed. 705 (1872) (evidence cannot be received in Supreme Court to contradict a finding of Court of Claims).

Nevertheless, the Supreme Court has recognized a long established exception when construing the meaning of treaties. Reversing the judgment of a lower court on the question whether the validity of a grant of land was protected by certain treaties, the Supreme Court examined diplomatic records outside the record and held that "the public acts and proclamations of (foreign) governments, and those of their publicly recognized agents, in carrying into effect those treaties, though not made exhibits in this cause, are historical and notorious facts, of which the court can take regular judicial notice." *United States v. Reynes*, 50 U.S. (9 How.) 127, 147-48, 13 L.Ed. 74 (1850); *see generally Jones v. United States*, 137 U.S. 202, 214-16, 11 S.Ct. 80, 84-85, 34 L.Ed. 691 (1890). In construing an extradition treaty the Court directed counsel's attention to matter outside the record and invited counsel to conduct a further search through "available diplomatic records and correspondence" in preparation for reargument of the case. *Factor v. Laubenheimer*, 290 U.S. 276, 295, 54 S.Ct. 191, 196, 78 L.Ed. 315 (1933). Nor is our consideration of the cable barred because it was not "available" when the record closed in the lower court. In determining the proper interpretation of a treaty provision, the Supreme Court relied on expressions of intent in diplomatic correspondence dated more than a year after the appellate court decision and within a few days of argument before the Court itself. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184 n. 9, 102 S.Ct. 2374, 2379 n. 9, 72 L.Ed.2d 765 (1982). Therefore, we deny the motions to strike.

II. The Merits

The court's "role is limited to giving effect to the intent of the Treaty parties." *Sumitomo*, 457 U.S. at 185, 102 S.Ct. at 2380;

accord Great-Western Life Assurance Co. v. United States, 678 F.2d 180, 183, 230 Ct.Cl. 477 (1982) (treaties must be construed to enforce intent of contracting parties). Because we deny the motions to strike, the record now reveals the intent of each government. Since both treaty parties agree that paragraph 2 was not intended to create an exemption from United States domestic taxation, the trial court's decision cannot be upheld. It is the government, not the taxpayers, which is entitled to judgment as a matter of law. Therefore, we reverse the decision of the Claims Court and direct that summary judgment be granted in favor of the appellant.

III. Costs

The government is denied its costs.

REVERSED

BISSELL, Circuit Judge, Additional Views, in which SMITH, Circuit Judge, joins.

While it is proper for this court to take judicial notice of the new evidence, introducing it hours before oral argument is certainly not something I want to encourage. The government has been on notice since the Coplins' case was filed in August 1981 that there would be judicial review of its interpretation of the Implementation Agreement's paragraph 2. During the more than four years that have elapsed there was ample opportunity to obtain the Panamanian interpretation of that provision. Indeed, the Claims Court repeatedly offered the government the opportunity to supplement the record with evidence of the official Panamanian position; the government "steadfastly refused." *Coplin*, 6 Cl.Ct. at 147. Moreover, as late as November 30, 1984, the government gave no hint it was about to introduce new evidence. To the contrary, commenting on its "refusal in this case to approach the government of Panama," the government reconfirmed its position: "The United States has consistently believed that there is no need to request that the Government of Panama supply its interpretation of Article XV, paragraph 2. . . ." Brief for Appellant at 46. Then, without

notice and only one working day before oral argument, the government suddenly revealed the diplomatic note to the taxpayers. Under these circumstances, to require the taxpayers to bear even their own costs borders on the unconscionable. Therefore, I would have the government pay the taxpayers' costs.

NIES, Circuit Judge, with whom RICH and BALDWIN, Circuit Judges, join, concurring.

I concur in the result of the majority decision that United States citizens employed by the Panama Canal Commission are not exempt from United States income taxes by Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty. A complete reading of the record, the treaty and the Implementation Agreement leads me to conclude that Article XV had no relevance to taxation by the United States of its own citizens. As held in *Corliss v. United States*, 567 F.Supp. 162, 164 (W.D.Ark.1983):

> When taken as a whole, the Court believes the import of Article XV is that the United States seeks to protect its agency, the Canal Commission, and its employees who work for that agency, from taxation by Panama on property or work activities other than private business activities in Panama unrelated to the Commission and property used in these activities.

Accord, *Highley v. United States*, 574 F.Supp. 715 (M.D.Tenn.1983).

With this understanding of the import of the entire Article, there is no need to construe the words "any taxes" in paragraph 2 other than literally. One need simply identify the Article by the title, "Taxation by the Republic of Panama," rather than "Taxation" *simpliciter*.

With respect to the late filed concurrence by the Panamanian government with the interpretation by the U.S. State Department, that evidence was not necessary to the above decisions and is not necessary here. It merely confirms the most reasonable interpretation of the Article.

APPENDIX B

UNITED STATES CLAIMS COURT

JULY 30, 1984

No. 517-81T.

PAUL H. COPLIN, *et ux.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

United States citizen employed by Panama Canal Commission claimed a refund of all United States taxes paid on income derived from his employment with the commission. Cross motions for summary judgment were filed. The Claims Court, Kozinski, C.J., held that: (1) the President was acting within scope of his authority when he signed implementation agreement governing taxation of the Commission, its contractors and employees, and (2) there was no showing that provision that United States citizen employees are exempt from "any taxes" on income received as a result of their work for the Commission did not mean what it says.

Plaintiff's motion granted; defendant's motion denied.

See also 1 Cl.Ct. 144.

OPINION

KOZINSKI, Chief Judge.

Paul H. Coplin[1] is a United States citizen employed by the Panama Canal Commission. He claims a refund of all United

[1]Patricia Coplin is named as a plaintiff because she signed a joint income tax return with her husband.

States taxes paid on income derived from his employment with the Commission during 1979. Plaintiff bases his claim on Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty. He claims that this provision exempts all U.S. citizens from taxation of income derived by virtue of their employment with the Commission. The parties have submitted the case for decision on cross-motions for summary judgment.

FACTS[2]

On September 7, 1977, after many years of negotiation, the United States and the Republic of Panama signed the Panama Canal Treaty, T.I.A.S. No. 10030 [hereinafter cited as Panama Canal Treaty], and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, T.I.A.S. No. 10029.[3] The Panama Canal Treaty superseded certain existing treaties between the United States and the Republic of Panama, particularly the Isthmian Canal Convention of November 18, 1903. 33 Stat. 2234, T.S. No. 431. Under the terms of the 1903 Convention, Panama had granted to the United States, in perpetuity, not only the right to build the canal, but exclusive sovereign rights over the ten-mile-wide zone traversed by the canal.

The Panama Canal Treaty restored to Panama territorial sovereignty over the Canal Zone. Panama, in turn, granted to the United States the right to manage, operate and maintain the canal until the year 2000. Operation of the canal during this period is entrusted to the Panama Canal Commission, an agency of the United States. The treaty provides for increasing participation by the Republic of Panama in the management and defense of the canal, in preparation for its assumption of

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[2]The background facts, which are not in dispute, are elegantly summarized in a portion of defendant's brief that the court has adopted with only minor revisions.

[3]The Neutrality Treaty provides for both parties to defend the canal and to keep it open to the ships of all nations.

full responsibility for the canal's operation upon expiration of the treaty.

Because the Canal Zone would no longer be subject to United States territorial sovereignty, it was necessary to define the rights and legal status of the Commission and its employees vis-a-vis each country. These matters were to be governed by the Agreement in Implementation of Article III of the treaty. Agreement in Implementation of Article III of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10031 [hereinafter cited as Implementation Agreement]. The Implementation Agreement contains 21 articles governing such subjects as use of land and water areas, use of housing areas, telecommunications, entry and departure, registration of vehicles, exemption from import duties and criminal jurisdiction.[4] Article XV of the agreement deals with taxation of the Commission, its contractors and sub- contractors, and its United States citizen employees and their dependents:

ARTICLE XV
TAXATION

1. By virtue of this Agreement, the Commission, its contractors and subcontractors, are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.

2. *United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission.* Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees and dependents shall be exempt from taxes, fees or other charges on gifts or inheri-

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[4]The legal status of United States armed forces in the Republic of Panama is governed by the Agreement in Implementation of Article IV of the Panama Canal Treaty. *See* p. 137 & n. 22 *infra*.

tance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

4. The Coordinating Committee may establish such regulations as may be appropriate for the implementation of this Article. [Emphasis added.]

On September 16, 1977, President Carter transmitted the two treaties to the Senate for its advice and consent. The Agreements in Implementation of Articles III and IV of the Panama Canal Treaty were not formally referred to the Senate, although they were transmitted and considered during the ratification hearings. The treaties were approved by the Senate subject to a variety of amendments, conditions, reservations and understandings. Staff of Senate Comm. on Foreign Relations, 96th Cong., 1st Sess., *Senate Debate on the Panama Canal Treaties: A Compendium of Major Statements, Documents, Record Votes and Relevant Events* 410-14, 493-96 (Comm.Print 1979) [hereinafter cited as *Senate Debate on the Panama Canal Treaties*]. Panama assented to each of these, *id.* at 549-52, 556-60, and the treaties went into effect on October 1, 1979.

ISSUES PRESENTED

Plaintiff reads paragraph 2 of Article XV of the Implementation Agreement as exempting him from U.S. taxation of income he earned as an employee of the Panama Canal Commission. Defendant argues that the Implementation Agreement cannot exempt plaintiff from U.S. taxation because the President is without power to create exemptions to the tax laws by means of an executive agreement not subject to the advice and consent of the Senate. Defendant also argues that even if Article XV could exempt plaintiff from income tax it does not in fact do so because it was intended to bar only Panama, and not the United States, from taxing Commission employees.

DISCUSSION

I.

Nature and Effect of the Implementation Agreement

A.

It is a rare case indeed where the United States takes the position that the President has exceeded his authority in the area of foreign relations. The implications of this argument, where it casts doubt on the validity of an agreement between our government and that of another country, are potentially quite serious. An examination of the Panama Canal Treaty and related documents reveals that the Implementation Agreement formed an integral aspect of the deal we struck with Panama. Article 111(9) of the treaty provides:

> The use of the areas, waters and installations with respect to which the United States of America is granted rights pursuant to this Article, and the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the [Implementation Agreement] signed this date.

The Implementation Agreement thus plays a key role in defining the mutual rights and obligations of the United States and Panama with respect to the operation of the canal. Nevertheless, defendant appears to argue that the Implementation Agreement is void to the extent that it provides what plaintiff says it does.

It is difficult to find a more eloquent description of the calamitous foreign policy implications of defendant's position than defendant's own brief in *Weinberger v. Rossi*, 456 U.S. 25, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982). *Weinberger* considered the validity of a Base Labor Agreement (BLA) signed by the President with the government of the Philippines. The agreement, which was not ratified by the Senate, gave Filipino citizens preferential consideration for civilian positions on U.S. military bases in the Philippines. The D.C. Circuit had held

that the BLA was repealed by a subsequent Act of Congress. In arguing for reversal, the government noted that the ruling below

> would impliedly "repeal" this Nation's commitment to the Philippines—given in exchange for that country's granting the United States the right to use military facilities located in the Philippines. . . . Such an implied "repeal," however, notwithstanding whatever effect it may have for domestic purposes, would have no effect upon the United States' binding international obligation under the BLA to prefer Filipino citizens for civilian employment on the bases. See L. Henkin, [*Foreign Affairs and the Constitution* 164 (1972)]; [2] C. Hyde, [*International Law Chiefly as Interpreted and Applied by the United States* 1465 (2d rev. ed. 1945)]; *Restatement (Second) of the Foreign Relations Law of the United States* . . . § 145(2).
>
> . . . Affirmance of the decision below thus would require the United States to breach what the Philippines views as a key provision of the BLA, with unpredictable consequences for our relations with that country and for the United States' continued use of military facilities located there.
>
> . . . It is even more difficult to predict the consequences that a breach of the BLA by the United States would have on its relations with . . . other countries and on the continued availability to the United States of the military facilities located there. One fair assumption, however, is that the court of appeals' decision, unless reversed, undoubtedly will hamper the United States' ability to negotiate for and maintain base rights and other military advantages in the Philippines and elsewhere.

Brief for the Petitioners at 29-31, *Weinberger v. Rossi*, 456 U.S. 25, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982) (emphasis original; footnotes omitted) [hereinafter cited as *Weinberger* Brief]. The Supreme Court found these arguments persuasive.

In light of these weighty considerations, it is at the very least surprising for the United States now to take the position that the court ought to ignore the terms of the Implementation Agreement because, if it means what plaintiff suggests, the President was acting ultra vires in agreeing to it. Defendant can, of course, argue that plaintiff's interpretation of the agreement is incorrect. That argument is addressed at length below. *See* pp. 125-149 *infra*. That is quite different, however, from suggesting that the court need not even bother construing the disputed paragraph because the President lacked the authority to bind the United States to its terms.

Were the court to accept defendant's argument, the consequences would be no less "unpredictable" than those catalogued so persuasively by the United States in *Weinberger*. The Implementation Agreement is an integral part of a very complex series of arrangements defining the relationship between our country and another; it concerns the Panama Canal, a waterway crucial to trade in peacetime and defense in case of war. *See* S.Exec.Rep. No. 12, 95th Cong., 2d Sess. 77-79, 91, 178-80 (1978) [hereinafter cited as S.Exec.Rep. No. 12]. A ruling that the President lacked authority to bind the United States to a portion of the Implementation Agreement would not, as the government pointed out in *Weinberger*, relieve the United States of its *international* obligation to comply with its terms. *See* 2 C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 1465 (2d rev. ed. 1945) [hereinafter cited as Hyde, *International Law*]; Vienna Convention on the Law of Treaties, art. 27, U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 Am.J.Int'l L. 875, 884 (1969) [hereinafter cited as Vienna Convention].[5] If Panama were to consider its interests impaired by such a ruling, it could take

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[5]As defendant has noted, "[a]lthough the Vienna Convention is not yet in force for the United States, it has been recognized as an authoritative source of international treaty law by the courts . . . and the executive branch." *Weinberger* Brief at 16 n. 9 (citations omitted).

steps that would adversely affect our interests.[6] Similarly, our relationship with other countries could suffer. In the words of the *Weinberger* Brief, "[o]ne fair assumption . . . is that . . . [it] will hamper the United States' ability to negotiate" future international agreements.

B.

Fortunately, the court need not confront these unsettling issues because the President had ample authority to bind the

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[6]While the *Weinberger* Brief left somewhat vague the potential consequences of a breach of an executive agreement, the Department of State has been more explicit, recognizing that the other signatory might be entitled to repudiate the agreement, depriving the United States of its benefits thereunder. For example, in 1957 the Department of State commented on H.R. 8704 (the Kilday resolution), which would have prohibited the President from delivering U.S. soldiers who had committed crimes abroad for trial by the host country. The Kilday resolution would have superseded certain Status of Forces Agreements that had been negotiated by the President without the advice and consent of the Senate. The Department of State argued against the Kilday resolution, noting as follows:

> But the greater danger is that our Allies might consider our actions pursuant to H.R. 8704 as in direct violation of our treaties and agreements and consider themselves no longer bound by their provisions. In that case not only would the foreign government have full jurisdiction over our servicemen for all offenses, but we would not have the benefit of any of the other provisions of our agreements which provide for special privileges with respect to such matters as drivers' licenses, exemption from taxation, postal services, procurement of supplies, visas, and the adjudication of civil claims against our forces.
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> . . . .
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> . . . This effect would be magnified if the foreign nations regarded our failure to abide by our agreement as a repudiation of the criminal jurisdiction provisions of the Status of Forces Treaty and similar agreements. In such an eventuality, the foreign state would be fully entitled under international law to try in their own courts all criminal offenses committed by the members of our armed forces within their territorial limits and we would have no legal right to prevent them from so doing.

Murphy, *Views of Department of State on House Resolution 8704*, 37 Dep't St.Bull. 317, 319-21 (1957) (emphasis original).

United States to all terms of the Implementation Agreement. *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981), established--if doubt existed before—that the President has significant powers to bind the United States to international agreements without the advice and consent of the Senate. Such agreements supersede prior United States law to the extent it is inconsistent. In *Dames & Moore*, for example, the President had signed executive agreements known as the Algiers Accords abrogating the rights of United States nationals to sue the government of Iran in our courts. The Supreme Court ruled that the President's action "effected a change in the substantive law." *Id.* at 685, 101 S.Ct. at 2989. While the Court noted that the abrogation of existing rights might constitute a taking, *id.* at 688-90, 101 S.Ct. at 2991-92, it upheld the President's authority to unilaterally change domestic law by executive agreement with a foreign state, *see id.* at 685-86, 101 S.Ct. at 2989-90; *accord United States v. Pink*, 315 U.S. 203, 230, 62 S.Ct. 552, 565, 86 L.Ed. 796 (1942) (international compacts and agreements are the " 'Law of the Land' under the supremacy clause"); *United States v. Belmont*, 301 U.S. 324, 330-31, 57 S.Ct. 758, 760-61, 81 L.Ed. 1134 (1937) (same).

Of course, the President's power to unilaterally dislocate domestic law is not without bounds. In *Dames & Moore*, the Court carefully reviewed the validity of the President's action by applying the classic analysis of Mr. Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634, 72 S.Ct. 863, 888, 96 L.Ed. 1153 (1952). It noted that the President signed the Algiers Accords with the knowledge and approval of Congress. "In such a case," the Court held, "the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.' " *Dames & Moore*, 453 U.S. at 668, 101 S.Ct. at 2981 (quoting *Youngstown Sheet & Tube*, 343 U.S. at 637, 72 S.Ct. at 871 (Jackson, J., concurring)). The Court therefore upheld the President's action even though the Algiers Accords

were not formally approved by the Senate pursuant to article II, section 2 of the Constitution.

It is difficult to imagine a case where the President's power to bind the United States by executive agreement would be less subject to challenge. Article III of the treaty refers to the Implementation Agreement, providing that it "shall govern the rights and legal status of United States Government agencies and employees operating in . . . Panama." The Foreign Relations Committee specifically noted that the Implementation Agreement "will be entered into pursuant to the authority of [the] treaty." S.Exec.Rep. No. 12, at 75.[7] The text of the agreement was submitted to the Senate for its review and the Senate in fact gave it careful consideration. *See, e.g., Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. Part 1, at 268-69 (1977); Part 3, at 702-11 (1977); Part 5, at 117-21 (1978) [hereinafter cited as *Treaty Hearings*]. The Report of the Foreign Relations Committee recommending ratification of the treaties summarized and discussed the Implementation Agreement and other related documents. S.Exec.Rep. No. 12, at 34-35. There is no doubt that, in consenting to the ratification of the Panama Canal Treaty, the Senate considered and approved the Implementation Agreement and intended that it go into effect under the authority of the treaty.

The principles governing this issue are so well established that citation of further authority would be superfluous were there not a Supreme Court case squarely on point. *Wilson v. Girard*, 354 U.S. 524, 77 S.Ct. 1409, 1 L.Ed. 1544 (1957), considered whether "an Administrative Agreement covering,

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[7]Treaties, like other laws, can form the basis of the President's authority to enter into executive agreements with other states. *Wilson v. Girard*, 354 U.S. 524, 526-29, 77 S.Ct. 1409, 1410-12, 1 L.Ed. 1544 (1957); *see also Dole v. Carter*, 444 F.Supp. 1065, 1068 (D.Kan.), *motion for injunction denied*, 569 F.2d 1109 (10th Cir.1977); Restatement (Second) of the Foreign Relations Law of the United States § 119 (1965); Cong. Research Serv., *The Constitution of the United States of America—Analysis and Interpretation*, S.Doc. No. 82, 92d Cong., 2d Sess. 509-11 (1973).

among other matters, the jurisdiction of the United States over offenses committed in Japan by members of the United States armed forces" was valid. *Id.* at 527, 77 S.Ct. at 1410. The agreement was authorized by a provision in a treaty with Japan that was almost identical to the relevant language of Article III of the Panama Canal Treaty. Security Treaty, Sept. 8, 1951, United States-Japan, art. III, 3 U.S.T. 3329, T.I.A.S. No. 2491. As in this case, the agreement was signed and submitted to the Senate for its review during the ratification process. The Court held:

> In the light of the Senate's ratification of the Security Treaty after consideration of the Administrative Agreement, which had already been signed, and its subsequent ratification of the NATO Agreement, with knowledge of the commitment to Japan under the Administrative Agreement, we are satisfied that the approval of Article III of the Security Treaty authorized the making of the Administrative Agreement and the subsequent Protocol embodying the NATO Agreement provisions governing jurisdiction to try criminal offenses.

Wilson v. Girard, 354 U.S. at 528-29, 77 S.Ct. at 1411-12.

The position urged by defendant appears to be squarely in conflict with this established body of Supreme Court caselaw.[8] The only authority defendant cites in support of its position is *Security Pacific National Bank v. Iran*, 513 F.Supp. 864, 872 (C.D.Cal.1981). *Security Pacific* addressed the issue that was eventually presented to the Supreme Court in *Dames & Moore* and appears to have reached the same conclusion. Of course, if there were an inconsistency between *Security Pacific* and *Dames & Moore*, there can be no doubt as to which case controls. If defendant knows how its position here can be squared with the Supreme Court's rulings in cases such as

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[8]Defendant's position also appears to be contrary to the position it has taken in other cases. *See, e.g.*, Brief for the Federal Respondents at 41-43, 50-53, *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

Dames & Moore and *Wilson v. Girard*, it has failed to articulate its rationale to this court or to other courts, some of which have accepted defendant's argument. *See Hollowell v. United States*, No. 82-713-ORL-CIV-EK, slip op. at 4 (M.D.Fla. Nov. 21, 1983); *Swearingen v. United States*, 565 F.Supp. 1019, 1021 (D.Colo.1983); *see also Long v. United States*, No. 83-158, slip op. at 4-5 (D.Or.July 22, 1983) (relying in part on *Swearingen*).[9]

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[9]Litigants have an obligation to research the law and to base their arguments on existing precedent or to suggest reasonable departures from precedent. *See St. Paul Fire & Marine Insurance Co. v. United States*, 4 Cl.Ct. 762, 770 (1984); Model Rules of Professional Conduct Rule 3.1 (1983). A party may not ignore apparently controlling authority while urging a court to rule in a manner inconsistent therewith. The court is therefore troubled by defendant's failure to discuss—or even cite—*Dames & Moore* and other relevant cases in its presentation to this court and to other courts that have considered this issue. *See* Memorandum of Law in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 11-15, *Rego v. United States*, 591 F.Supp. 123 (W.D.Tenn.1984); Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 11-15, *Harris v. United States*, 585 F.Supp. 862 (S.D.Ga.1984); Memorandum of Law in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 11-15, *Stabler v. United States*, No. CA3-83-0166-R (N.D.Tex. Nov. 30, 1983); Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 11-15, *Hollowell v. United States*, No. 82- 713-ORL-CIV-EK (M.D.Fla. Nov. 21, 1983); Memorandum of Law in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 11-15, *Pierpoint v. United States*, No. 83-0354-2 (D.S.C. Oct. 3, 1983); Opposition to Plaintiffs' Cross-Motion for Summary Judgment at 11-15, *Snider v. United States*, No. C83-638V (W.D.Wash. Sept. 23, 1983); Memorandum of the United States in Support of its Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 12-15, *Long v. United States*, No. 83-158 (D.Or. July 22, 1983); Memorandum in Support of Defendant's Motion for Summary Judgment at 7-8 & Defendant's Reply to Plaintiffs' Opposition Memorandum at 3-4, *Swearingen v. United States*, 565 F.Supp. 1019 (D.Colo.1983); Memorandum of the United States in Support of its Motion for Summary Judgment at 11-14, *Watson v. United States*, No. C82-319T (W.D.Wash. June 21, 1983); Pre-Trial Brief for the United States at 11-14 & Memorandum of the United States in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment at 11-14, *Stokes v. United States*, No. C82-160T (W.D.Wash. June 21, 1983); Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Reply Memorandum in Support of Defendant's Motion for Summary Judgment at 8-12, *Corliss v. United States*, 567 F.Supp. 162 (W.D.Ark.1983); Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 11-15, *Highley v. United States*, 574 F.Supp. 715 (M.D.Tenn.1983); Memorandum Brief for Respondent at 10-11, *McCain v. Commissioner*, 81 T.C. 918 (1983).

The Implementation Agreement is the paradigm of presidential action in the area of foreign relations supported by specific congressional authorization. It is therefore entitled to "the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown Sheet & Tube*, 343 U.S. at 637, 72 S.Ct. at 871 (Jackson, J., concurring). It has the force and effect of law. *Accord Watson v. United States*, 592 F.Supp. 701, 705 (W.D.Wash. 1983).

Since the Implementation Agreement has the force of law, it implicitly repeals prior conflicting laws. *See, e.g., Dames & Moore*, 453 U.S. at 685, 101 S.Ct. at 2989; *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190, 98 S.Ct. 2279, 2299, 57 L.Ed.2d 117 (1978); *Polos v. United States*, 621 F.2d 385, 223 Ct.Cl. 547, 560-61 (1980); *Nebraska Public Power District v. 100.95 Acres of Land*, 719 F.2d 956, 958 (8th Cir.1983). In the area of income taxation, however, there is a statutory mechanism that makes it unnecessary to rely merely upon repeal by implication. *See* 26 U.S.C. § 894(a) (1982). This section provides that "gross income" shall not include any income excluded "by any treaty obligation of the United States." The term "treaty obligation" in section 894 is broad enough to include executive agreements that are signed by the President pursuant to constitutional or statutory authority.

As the Supreme Court recognized in *Weinberger v. Rossi*, "[t]he word 'treaty' has more than one meaning." 456 U.S. at 29, 102 S.Ct. at 1514. Under certain circumstances it may refer only to those international agreements formally entered into by the President and approved by the Senate pursuant to article II, section 2 of the Constitution. *Id.* at 30-31 & nn. 7 & 8, 102 S.Ct. at 1514-1515 & nn. 7 & 8. Frequently, however, when

Congress uses the word "treaty" it is also referring to executive agreements that are not formally approved by the Senate and are therefore not article II treaties. *Id.* at 30-31, 102 S.Ct. at 1514-1515; *B. Altman & Co. v. United States*, 224 U.S. 583, 601, 32 S.Ct. 593, 597, 56 L.Ed. 894 (1912) ("a compact . . . negotiated and proclaimed under the authority of [the] President . . . is a treaty").

In *Weinberger v. Rossi*, the court determined that the word "treaty," as used in section 106 of Pub.L. No. 92-129, 85 Stat. 348, 355 (1971), was meant to include executive agreements. One basis for the Supreme Court's conclusion was that the statute in question did not affect the foreign policy of the United States. 456 U.S. at 31, 102 S.Ct. at 1515. In such circumstances, Congress is less likely to use the term "treaty" in a technical, restricted sense and "there is even more reason to construe Congress' use of 'treaty' to include international agreements as well as Art. II treaties." *Id.* Like the statutes in *Weinberger* and *Altman*, section 894 does not directly concern foreign policy and therefore the term "treaty" is likely to have been used in its broader, less technical sense.

Moreover, at the time section 894 was first enacted[10] there were a number of international agreements pertaining to taxation that had been negotiated by the President pursuant to statutory authorization but without Senate approval. *See, e.g.*, Agreement Providing for Relief from Double Income Tax on Shipping Profits, Aug. 24, 1933-Jan. 9, 1934, United States-Ireland, 48 Stat. 1842, E.A.S. No. 56; Agreement Providing for Relief from Double Income Tax on Shipping Profits, Mar. 31-June 8, 1926, United States-Japan, 47 Stat. 2578, E.A.S. No. 3. The practice has continued over the years with the apparent approval of Congress. *See, e.g.*, Agreement Regarding Double Taxation of Aircraft Earnings, Dec. 29-Dec. 31,

[10]Section 894 was originally enacted as section 22(b)(7) of the Revenue Act of 1936. Pub.L. No. 74-740, 49 Stat. 1648, 1658 (1936). It was recodified as section 894 at the time of the 1954 revision of the Income Tax Code. The section was amended in 1966 in a manner not relevant to the point here in issue.

1975, United States-Chile, 27 U.S.T. 1371, T.I.A.S. No. 8252; Agreement Regarding Relief from Double Taxation on Earnings from Operation of Ships and Aircraft, Dec. 21-Dec. 27, 1962, United States- Iceland, 13 U.S.T. 3827, T.I.A.S. No. 5255. In *Weinberger*, the Court noted the existence of such international agreements and concluded that Congress would not have intended to repeal them by implication in passing the legislation there in question. It therefore read the term "treaty" broadly. Similarly, section 894 ought to be read broadly to avoid conflict between the income tax laws and these otherwise valid executive agreements.

Given that the legislative history of section 894 and its predecessor shed absolutely no light on the subject, these considerations lead to the conclusion that the term "treaty" in section 894 ought to be read to include executive agreements such as the Implementation Agreement here in issue.

II.

INTERPRETATION OF ARTICLE XV OF THE IMPLEMENTATION AGREEMENT

A.

The Language and Its Plain Meaning

1. Treaties and other international agreements are contracts between sovereign states. *Santovincenzo v. Egan*, 284 U.S. 30, 40, 52 S.Ct. 81, 84, 76 L.Ed. 151 (1931); *Geofroy v. Riggs*, 133 U.S. 258, 271, 10 S.Ct. 295, 298, 33 L.Ed. 642 (1890). In interpreting such documents, the court must divine and give effect to "the intention of the two governments." *United States v. Texas*, 162 U.S. 1, 36, 16 S.Ct. 725, 732, 40 L.Ed. 867 (1896). Therefore, while international agreements have the force and effect of law, they must be construed more like contracts than like statutes,[11] for the court must consider the interests and

[11]As noted by Chancellor Kent over a century ago:

> Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon indi-

intentions of both parties "to secure equality and reciprocity between them." *Jordan v. Tashiro*, 278 U.S. 123, 127, 49 S.Ct. 47, 48, 73 L.Ed. 214 (1928); *Geofroy v. Riggs*, 133 U.S. at 271, 10 S.Ct. at 298. *See The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 32-33, 5 L.Ed. 191 (1821). Professor Bishop has noted as follows:

> Even though we may come to speak of multilateral treaties as "international legislation", and they do have many characteristics of legislation in that such treaties make law for those states which become parties to them, we must never forget that international agreements remain basically and fundamentally just that: *agreements*, or contracts between two or more states.

Bishop, *Reservations to Treaties*, 103 Recueil des Cours 245, 255 (1962) (emphasis original) [hereinafter cited as Bishop].

"Interpretation of [a treaty] must, of course, begin with the language of the Treaty itself." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982). Indeed, "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' " *Id.* (quoting *Maximov v. United States*, 373 U.S. 49, 54, 83 S.Ct. 1054, 1057, 10 L.Ed.2d 184 (1963)).[12] In construing treaties, words "are to be

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> viduals; and they are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.

1 J. Kent, *Commentaries on American Law* * 174, *cited with approval in Tucker v. Alexandroff*, 183 U.S. 424, 437, 22 S.Ct. 195, 200, 46 L.Ed. 264 (1902); *accord Sullivan v. Kidd*, 254 U.S. 433, 439, 41 S.Ct. 158, 160, 65 L.Ed. 344 (1921).

[12]The International Court of Justice has taken the same view:

> The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is

taken in their ordinary meaning . . . and not in any artificial or special sense impressed upon them by local law." *Geofroy v. Riggs*, 133 U.S. at 271, 10 S.Ct. at 298; *accord Santovincenzo*, 284 U.S. at 40, 52 S.Ct. at 84; *see* Vienna Convention art. 31, 63 Am.J.Int'l L. 885.

Perhaps the simplest and most direct guidance as to how a treaty must be construed comes from Mr. Chief Justice Hughes, who noted as follows:

> [I]t is our duty to interpret [a treaty] according to its terms. These must be fairly construed, but we cannot add to or detract from them.

Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 11, 57 S.Ct. 100, 103, 81 L.Ed. 5 (1936).

2. Paragraph 2 of Article XV of the Implementation Agreement speaks in clear and sweeping terms. It provides that "United States citizen employees [of the Panama Canal Commission] . . . shall be exempt from any taxes . . . on income received as a result of their work for the Commission." This language stands in sharp contrast with that of paragraph 1 of the same article which provides that the Commission itself shall be "exempt from payment *in the Republic of Panama* of all taxes." (Emphasis added.) Paragraph 3 of the same article, dealing with personal property, gift and inheritance taxes of U.S. citizen employees, displays a similar contrast, providing that their "presence . . . *within the territory of the Republic of Panama* . . . due solely . . . [to] their . . . work with the Commission" shall not serve as a basis for the exercise of taxing jurisdiction. (Emphasis added.) Finally, Article XV is titled

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> to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. *If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.*

Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 8 (Advisory Opinion of Mar. 3) (emphasis added).

simply "Taxation" and not "Panamanian Taxation" as one would expect if its subject were limited as defendant suggests. By contrast, Article IX, which provides that the Commission shall give preference to supplies and services obtainable in Panama, is titled "Acquisition of *Panamanian* Supplies and Services." (Emphasis added.) When defining rights and responsibilities of only one of the signatory states, the drafters apparently knew how to so provide.

It is also instructive that when addressing the subject of taxation elsewhere in the treaty documents, the parties were careful to specify which country's taxes were meant. For example, paragraph 9 of Article IX of the treaty provides that vessels passing through the canal "shall be exempt from any taxes . . . by the Republic of Panama." Similarly, paragraph 2(e) of Article XI of the Implementation Agreement, dealing with United States contractors of the Commission, provides that such contractors "shall not be obliged to pay any tax . . . to the Republic of Panama" so long as they are taxed in the United States at a substantially equivalent rate. This is an agreement drafted by sophisticated parties, obviously capable of using precise language.

The Supreme Court has held that "general principles applicable to the construction of written instruments" apply to the construction of treaties. *Tucker v. Alexandroff*, 183 U.S. 424, 436, 22 S.Ct. 195, 200, 46 L.Ed. 264 (1902). Specifically, "the enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter. . . . The rule is curtly stated in the familiar legal maxim, *expressio unius est exclusio alterius*." *Id.* The fact that Article XV, according to its heading, purports to deal with the general subject of taxation, that two of its paragraphs specifically refer to the imposition of taxes by Panama only, and that the parties were careful elsewhere in the treaty to specify the taxing authority being addressed, all support plaintiff's interpretation of paragraph 2. Indeed, a fair reading of the language in question leads to the conclusion that it unambiguously exempts U.S. citizens who

are Commission employees from taxation by Panama as well as the United States. *Accord Harris v. United States*, No. CV 183-077, slip op. at 3 (S.D.Ga. Mar. 21, 1984), *appeal docketed*, No. 84-8424 (11th Cir. May 18, 1984); *Swearingen*, 565 F.Supp. at 1020.[13]

B.

The Position of the United States

Defendant argues that the treaty language should not be construed in accordance with its plain meaning because to do so would do violence to the intention of the signatories. A court ought not, of course, give literal effect to treaty language if it is persuaded that such language does not reflect the intention of the high contracting parties. *See, e.g., Sumitomo Shoji*, 457 U.S. at 180, 102 S.Ct. at 2377; *Great-West Life Assurance Co. v. United States*, 678 F.2d 180, 230 Ct.Cl. 477, 481 (1982); Vienna Convention art. 32, 63 Am.J.Int'l L. 885. On the other hand, the court may not simply rewrite the contract to achieve an end it deems [illegible]e. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 678, 87 L.Ed. 877 (1943). Where the language is reasonably clear, the party proffering a contrary interpretation must persuade the court that its construction comports with the view of *both* parties. *See United States v. Texas*, 162 U.S. at 36, 16 S.Ct. at 732; *see also Sumitomo Shoji*, 457 U.S. at 180, 102 S.Ct. at 2377 (plain meaning of the treaty controls unless it is inconsistent "with the intent . . . of its signatories"). If the court has doubt about the intention of one of the signatories, it cannot ignore the language of the instrument. Absent convincing evidence to the contrary, the court will presume that a party—particularly one

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[13]Defendant's position that the language of Article XV is ambiguous is not entirely unlike that adopted by one of Lewis Carroll's characters: " 'When *I* use a word', Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' " *Through the Looking Glass*, in The Complete Works of Lewis Carroll 121, 196 (1939), *quoted with approval in Tennessee Valley Authority v. Hill*, 437 U.S. at 173 n. 18, 98 S.Ct. at 2291 n. 18.

of some sophistication like a sovereign state— understood and agreed to the language as written.

Defendant raises three arguments in support of its contention that Article XV was meant to bar only Panama and not the United States from taxing Commission employees. First, it asserts that Panama could have no interest in whether the United States taxes its citizens who work for the Panama Canal Commission. To support this contention, it relies on the negotiating history of Article XV and on the "common sense" notion that the United States would not bargain with other countries as to when and how it will tax its own citizens.

Next, defendant argues that its interpretation is entitled to significant, perhaps controlling, weight. It supports this argument by reference to a number of Supreme Court opinions that, indeed, stand for the proposition that courts ought to afford substantial deference to interpretations of treaties by agencies of the Executive Branch.

Finally, defendant argues that the United States Senate intended Article XV to operate only against Panama and not the United States. It points to the legislative history of the ratification proceedings and suggests that Article XV ought to be interpreted so as to reflect the intention of Congress as expressed during its deliberations.

The court considers each of these arguments in turn.

1. The Negotiating History

a. Before delving into the negotiating history, the court notes that the record presented poses considerable obstacles to a determination of what the parties intended when they agreed to Article XV of the Implementation Agreement. Defendant has produced parts of 18 documents (apparently all previously classified) consisting of telegrams, speech outlines, transcripts of negotiating sessions and State Department memoranda, all concerning negotiations between the United States and Panama on the subject of taxation of United States citizens employed by the Panama Canal Commission. The documents

cover the period from June 30 to August 12, 1977, the latter date being marked by correspondence from President Carter to Congress advising that our negotiators had tentatively reached agreement with Panama on all terms of the treaties and related documents. Defendant informs the court that these are all of its contemporaneous negotiating records pertaining to what eventually became Article XV of the Implementation Agreement. In addition, plaintiff has provided an affidavit from a Panamanian negotiator relating events at a negotiating session not mentioned in defendant's documents.

The materials presented leave many questions unanswered. For example, there is *no* contemporaneous evidence as to the meaning either party placed on the language of Article XV that is the subject of this controversy. Moreover, there is *no evidence whatsoever* as to the interpretation given this language by Panama. *But see* n. 16 *infra*. While the record provides valuable insights as to the interests and motivations of the parties, the court is left largely to surmise and conjecture as to how they resolved their differences and what might have motivated each side to agree to the language finally adopted.

This is far from an ideal basis on which to resolve such a difficult and sensitive issue. The court therefore suggested that the record be supplemented at trial or through additional documentation. As is more fully discussed below, this suggestion was rejected. *See* pp. 42-44 *infra*. With some reluctance, therefore, the court examines the evidence presented to determine whether it supports defendant's assertion that the negotiating history is consistent with its interpretation of Article XV.

b. The record presented—sketchy though it be—paints a far more complex picture of what happened at the negotiating table than defendant's argument would suggest. It is clear that the United States and Panama held widely divergent views on the subject of taxation of Commission employees. Surprisingly, however, this was not principally a quibble over tax revenues. The dispute centered largely on a fundamental disagreement as to the nature and status of the Panama Canal Commission.

The United States viewed the Commission as an agency of the U.S. Government, much like other government agencies conducting U.S. Government business abroad. Our negotiators were concerned that acquiescing to demands that Panama be allowed to tax Commission employees would be tantamount to permitting taxation of the U.S. Government. They also feared that yielding on this issue could expose the United States to the demands of other governments that might wish to tax employees of U.S. agencies operating on their soil. This theme, which was echoed again and again, is perhaps best summarized by an excerpt from the statement of U.S. Ambassador Sol M. Linowitz during the June 30, 1977, negotiating session held in Washington, D.C.:

> [O]n the Income Tax question which you raised with us . . . I can tell you this: We have explored this carefully with the Treasury Department and with the legal people involved with the Internal Revenue Service—and it does pose a very great problem.
>
> This is not done anywhere in the world. No employee of a government, of the United States Government or of a government agency, is now subject to taxes in a foreign country; and it would therefore, call for a wholly new approach to this problem—which is being very strongly resisted.

Motion of the United States for Summary Judgment and Brief in Support Thereof at 48 (filed Nov. 22, 1983) [hereinafter cited as Defendant's Brief].

The Panamanians viewed the matter quite differently. To them, the Panama Canal Commission was not merely a United States agency conducting U.S. Government operations in Panama. They viewed the Commission as a commercial enterprise operated jointly by the two governments, fundamentally different from agencies performing purely governmental functions on behalf of the United States alone. This view was summarized by Ambassador Romulo Escobar Betancourt of Panama at the July 12, 1977, negotiating session:

> Now, I understand the view that you put forward here yesterday . . . that in your case there's no precedent anywhere in the world for this. But if I understood the argument advanced, there haven't been any cases either in which you've had an operation like this—a joint operation between two countries.
>
> We're not talking about income tax to be paid by the military assigned to Panama; we're talking about income tax to be paid by citizens whose wages would be derived from the Panama Canal. In other words, the salaries to be paid by the U.S. nationals don't come from the United States but, rather, they would be derived from the operation of the Canal. So maybe they could be allowed to pay taxes in Panama since from here on they'll be working under Panamanian jurisdiction and using Panamanian services.

Defendant's Brief at 73-74.[14]

[14]The Panamanian position was not without support. While the Panama Canal Treaty and the Implementation Agreement refer to the Commission as an agency of the United States, Panama Canal Treaty art. III (3); Implementation Agreement art. I (1), its structure and operation differ in fundamental respects from the typical U.S. Government agency. For example, the Commission is supervised by a board composed of nine members, four of whom must be Panamanian nationals proposed by Panama. Panama Canal Treaty art. III(3)(a). The United States may not unilaterally remove any of the Panamanian members, but must reach agreement with Panama on any proposed removal. *Id.* art. III (3)(b). Upon removal of a Panamanian member, Panama may propose a replacement. *Id.* Until 1990, the Administrator of the Commission shall be an American and the Deputy Administrator a Panamanian. *Id.* art. III (3)(c). Starting in 1990 and until the treaty expires in the year 2000, the Administrator shall be Panamanian and the Deputy, American. *Id.* The treaty also provides for the appointment of a Panama Canal Consultative Committee, composed of an equal number of Americans and Panamanians, to advise the two governments on matters of policy affecting the canal. *Id.* art. III(7). In addition, the treaty calls for the employment of increasing numbers of Panamanian employees at all levels, "with the objective of preparing, in an orderly and efficient fashion, for the assumption by the Republic of Panama of full responsibility for the management, operation and maintenance of the Canal upon the termination of this Treaty." *Id.* art. III(8).

An exchange from the July 14, 1977, negotiating session reveals that the Panamanian negotiators were uncomfortable with the U.S. view that operation of the canal would continue to be an exercise of U.S. sovereign authority within their territory:

> **[Mr. Rodrigo] Gonzales [of Panama]:** . . . [I]f the National Bank of Panama, an agency of the government, established a branch in the US, its Panamanian employees would be liable to pay American income tax. The same thing applies to foreign workers in Panama. . . . Another example is Volvo, a government-owned company, which has set up assembly plants in the US. Both its American and Swedish workers pay US income tax.
>
> **[Ambassador Ellsworth] Bunker [of the United States]:** US government employees do not pay income tax anywhere in the world.
>
> [Minister Aristides] Royo [of Panama]: We must recognize the changing situation, that this Zone will no longer be a place where American workers are subjected to US jurisdiction, laws, police and courts. The situation now will be one in which American workers, although employed by the American government, will be subjected to a foreign jurisdiction, police, as the colonial status will cease to exist.

Defendant's Brief at 79-80. Minister Royo's final comment suggests that the Panamanian position was animated at least in part by a desire to alter as much as possible the pre-treaty situation where the United States exercised full sovereignty in operating the canal.

As disclosed by a State Department briefing paper prepared on July 8, 1977, the United States was well aware of the motivations of the Panamanian negotiators and appreciated that this was not principally a dispute over revenues:

> *Suggested Position and Strategy:*

> We should not agree to taxation of U.S. citizen employees. Since taxation of U.S. employees would not yield very much in new revenues [remainder of sentence classified].
>
> *Supporting Arguments:*
>
> —Taxation of U.S. employees by a foreign country would be tantamount to taxation of the [U.S. Government]. This is not acceptable international practice.
>
> —While it is international practice to tax employees of government trade organizations, airlines etc. on the basis that these enterprises fulfill a commercial function, government employees engaged in governmental activities are not taxed.
>
> —Contrary to Panama's argument, we have always managed the waterway as a government—not a commercial—facility. Personnel policies, toll structures and financial practices reflect this. The Canal is, in effect, a government monopoly, not a commercial enterprise, and its employees should be treated accordingly.
>
> . . . .
>
> *-Panama may be raising this as an issue to assert its "sovereign right" to tax persons resident within its jurisdiction. The money involved is not important to the [Government of Panama], but the principle is.* At current Panamanian tax rates, tax payments by US employees would total approximately $2 million per annum (average U.S. employee taxable income is $11,000+). [Remainder of paragraph classified.]

Defendant's Brief at 62-63 (emphasis added).

[Paragraph deleted from published version of opinion.][15]

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[15]Certain materials pertaining to the negotiating history are still classified and were examined by the court ex parte. The portion of the opinion discussing classified information has been separately filed in camera and is subject to dissemination only pursuant to a separate order.

As the negotiations progressed, the positions of the parties hardened and their differences grew wider rather than narrower. As Ambassador Linowitz noted at the July 11, 1977, negotiating session, "these problems have been even intensified in our further discussions." Defendant's Brief at 56.

The last negotiating session for which we have a contemporaneous record was held on July 18, 1977, in Washington and there appears to have been no specific discussion of this issue. However, a memorandum from U.S. Ambassadors Bunker and Linowitz to the Secretary of State indicates that the issue had not been resolved as of July 21. The memorandum, which provides "talking points" for the Secretary, continues to reflect the U.S. position that taxation of Canal Commission employees by Panama would set an undesirable precedent and that the monetary gain to Panama would be relatively small. In addition, the memorandum suggests that a U.S. concession on this point "would be the type of issue which treaty opponents could use to considerable advantage." Defendant's Brief at 95.

At this point, the contemporaneous record of negotiations abruptly ceases. It is important to note that the language that eventually became Article XV of the Implementation Agreement was not considered during any of the sessions for which we have a transcript or other contemporaneous documentation. Indeed, information provided by the U.S. Government does not disclose when this language was first considered, what if anything was said about it, or even who was in attendance. Curiously, the only evidence we have on the consideration of the Article XV language comes from *plaintiff* by means of the Affidavit of Dr. Carlos Alfredo Lopez Guevara, Panama's Ambassador Extraordinary and Plenipotentiary for Canal Treaty negotiations. Ambassador Guevara reports that the parties met a last time in Panama during August and that the language in question was presented by the United States during that session. According to Ambassador Guevara, "[the] text [of paragraph 2] was tabled without explanation and no objection was raised by the Panamanian Delegation. Therefore, it was

agreed." Affidavit of Dr. Carlos Alfredo Lopez Guevara ¶ 5 (filed Mar. 8, 1984) [hereinafter cited as Guevara Affidavit].[16]

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[16]Ambassador Guevara goes on to state that the language of paragraph 2 was intended to preclude both the United States and Panama from taxing American employees of the Commission, that it was so read by Panama, and that a contrary interpretation by the United States would be viewed as a material breach of the treaty. Guevara Affidavit ¶¶ 6, 7.

Defendant has objected to this portion of the Guevara affidavit arguing that "it simply is an opinion after the fact. It's not contemporaneous. It was prepared in preparation of this lawsuit." Official Transcript in the Matter of *Coplin v. United States*, Feb. 23, 1984, at 26 [hereinafter cited as Feb. 23 Transcript]. Defendant's position on the admissibility of this type of evidence has been less than consistent. Appended to defendant's brief is the Affidavit of Michael G. Kozak, Deputy Legal Advisor for the United States Department of State. Mr. Kozak states that between 1973 and 1977 he served as a member of the U.S. negotiating team for the Panama Canal Treaty and "participated directly in the negotiation of the Panama Canal Treaty and of the Agreements in Implementation thereof." Affidavit of Michael G. Kozak ¶ 3 (Dec. 8, 1982), *reprinted in* Defendant's Brief at 19. Mr. Kozak notes that he was "one of the principal drafters of the Treaty and of the Agreements in Implementation of Articles III and IV thereof." *Id.* ¶ 4. Mr. Kozak does not claim to have been present at the negotiating session where the language of Art. XV was considered nor do we have any other indication that he was there. *See* pp. 142-143 *infra*. Nevertheless, he opines as follows:

> The purpose of the pertinent language of Article [ ] XV . . . [is] to ensure that United States citizen employees of the Canal Commission . . . would not be subject to host-country [i.e., Panamanian] taxation.

Id. ¶ 11. Defendant relied on the Kozak Affidavit to support its Requested Finding of Fact No. 6 pertaining to the purpose of Article XV. It is anomalous for defendant to object to the statement of Ambassador Guevara regarding the meaning of the language in question, but to tender the statement of Mr. Kozak on the very same point.

Defendant now concedes that the Kozak Affidavit may not be used to divine the purpose of Article XV. Feb. 23 Transcript at 30-31. Defendant has also suggested that reliance on the Kozak Affidavit to support its proposed finding as to intent was inadvertent. Reply Brief for the United States in Support of its Motion for Summary Judgment at 7 n. 4 (filed Jan. 23, 1984). Defendant has not, however, explained why paragraph 11 of the Kozak Affidavit was presented at all, given its position as to the admissibility of post-hoc statements by negotiators. Moreover, the Kozak Affidavit, in the very form presented to this court, has been presented to other courts that have considered this issue. *See* n. 9 *supra*. Some of those courts have expressly relied on

c. Defendant appears to overlook the fundamental issue in these negotiations when it argues that Article XV was not

it. *See, e.g., Stabler v. United States*, No. CA3-83-0166-R, slip op. at 3 (N.D.Tex. Nov. 30, 1983); *Pierpoint v. United States*, No. 83-0354-2, slip op. at 5-6 (D.S.C. Oct. 3, 1983). Other courts may have been swayed by the affidavit without specifically mentioning it.

Whether a court may consider non-contemporaneous statements of negotiators for purposes of divining the intention of the parties is, in fact, a difficult and unsettled question. At least one Supreme Court opinion seems to suggest that such evidence is not admissible. *Arizona v. California*, 292 U.S. 341, 359-60, 54 S.Ct. 735, 742-43, 78 L.Ed. 1298 (1934) (Brandeis, J.). It is unclear the extent to which the ruling in *Arizona* is bound up in the specific facts of that case and whether its rationale survives the adoption of the Federal Rules of Evidence. *See United States v. Jacobs*, 547 F.2d 772, 777 (2d Cir.1976), *cert. dismissed*, 436 U.S. 31, 98 S.Ct. 1873, 56 L.Ed.2d 53 (1978) (purpose of Rule 402 "was to bar common law rules of evidence . . . if inconsistent").

International courts and arbitrators have traditionally relied on non-contemporaneous statements of negotiators. For example, in a dispute concerning the Jay Treaty of Nov. 19, 1794, the depositions of John Adams and John Jay, surviving negotiators, were considered, as was a letter from Benjamin Franklin. 1 J. Moore, *International Adjudications* 63-67 (1929). One commentator has argued that where a jury is not involved, "[d]eclarations of [the] negotiators, in so far as they indicate the sense in which terms were employed, are valuable, not merely because they are enlightening, but also because they may be safely entrusted to the consideration of judges or arbitrators." 2 Hyde, *International Law* 1497; *cf. Sumitomo Shoji*, 457 U.S. at 187 n. 10, 102 S.Ct. at 2379 n. 10 (distinguishing government's official position from "evidence of the state of mind of the Treaty negotiators").

Because the issue is unsettled, and because the evidence in question is merely cumulative, the court decides this case *without* reliance on the statements of negotiators on either side as to the intent of the parties. The court notes, however, that insofar as reliance on such statements is deemed relevant and probative, Ambassador Guevara is the only one identified as having been present at the negotiating session where the language of Article XV was actually considered. He is therefore the only one competent to give an opinion as to the intent of the negotiators.

The court does rely on the Guevara Affidavit insofar as it describes the physical events at the August 1977 negotiating session. As an eyewitness participant, his competency to testify as to what he saw and heard is not subject to challenge. Indeed, defendant has largely adopted the Guevara version of what transpired. Official Transcript in the Matter of *Coplin v. United States*, Mar. 8, 1984, at 35-36 [hereinafter cited as Mar. 8 Transcript].

intended to shield Commission employees from U.S. taxation because that possibility was not expressly raised during the negotiating sessions for which we have a record. Equally naive is its assertion that Panama could have no interest in whether the U.S. taxes its citizens who live and work on Panamanian soil and operate the canal in which it has such a significant interest. Defendant's error lies in characterizing the negotiations as turning exclusively on fiscal issues, whereas the record indicates that the controversy was primarily a political one.[17]

To the United States, the question of revenues was of relatively little consequence; it felt, however, that allowing Panama to tax Commission employees would set a bad precedent worldwide. Panama, for its part, appears to have felt that operation of the canal was a joint commercial venture by the two governments, not a continued exercise of U.S. sovereign authority. Putting the matter in terms of other tax conventions to which the United States is a party, our negotiators wanted Commission employees to be treated for tax purposes as if they were performing purely U.S. governmental functions while the Panamanian negotiators wanted Commission employees treated as if they were providing commercial services. *See, e.g.*, Agreement for the Avoidance of Double Taxation and Prevention of Tax Evasion with Respect to Taxes on Income, Apr. 30, 1984, United States-China, art. 18, *reprinted* in 23 Tax Notes 695 (1984) (not yet ratified); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, June 17, 1980, United States-Denmark, art. 20, *reprinted in* Sen.Exec. Q, 96th Cong., 2d Sess. (1980)

[17]If the question had been one of revenues alone, it could have been resolved without reference to the tax issue. The parties were in the process of negotiating fees to be paid by the Commission for services provided by Panama. The package ultimately agreed upon called for an initial annuity to Panama of $50-60 million per year. S.Exec.Rep. No. 12, at 100. According to the U.S., Panama would derive no more than $2-3 million from taxing Commission employees. Defendant's Brief at 95. Because this amount was viewed as relatively trivial, it could have been factored into the negotiations for the annuity payment.

(not yet ratified) [hereinafter cited as Denmark Treaty]; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, July 1, 1957, United States-Pakistan, art. IX, 10 U.S.T. 984, T.I.A.S. No. 4232 [hereinafter cited as Pakistan Treaty]; Convention for the Avoidance of Double Taxation and the Establishment of Rules of Reciprocal Administrative Assistance in the Case of Income and Other Taxes, Mar. 23, 1939, United States-Sweden, art. X, 54 Stat. 1759, T.S. No. 958 [hereinafter cited as Sweden Treaty].[18] So far as this record discloses, neither side gave any indication that it was prepared to yield to the other's position.

The language finally adopted reflected the position of neither party. Indeed, it neatly sidestepped the sensitive sovereignty issue altogether. Without a statement from Panama, it is of course difficult to be certain as to what its motivations might have been in accepting this language. However, several pos-

[18]As these and other tax treaties demonstrate, the United States is committed to the principle that only those employees performing *governmental* functions will be exempt from host-country taxation. Article VI(2) of the treaty with Canada, for example, provides that the tax exemption "shall not apply to payments in respect of services rendered in connection with any trade or business carried on for purposes of profit by either of the contracting states or by any agency, instrumentality or political subdivision thereof." Convention and Protocol for the Avoidance of Double Taxation and Prevention of Fiscal Evasion in the Case of Income Taxes, Mar. 4, 1942, United States-Canada, art. VI(2), 56 Stat. 1399, T.S. No. 983 [hereinafter cited as Canada Treaty]. Whether operation of the Panama Canal is a profit-making enterprise or performance of a governmental function is a question as to which two states may differ. In that regard, it is worth noting that the technical explanation to a similar provision in a more recent treaty with Canada (not yet ratified) provides that the determination ought to be made "by a comparison with the concept of a governmental function in the State in which the income arises." Technical Explanation of the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, signed at Washington, D.C., on Sept. 26, 1980, art. XIX, *reprinted in* Tax Treaties (CCH) ¶ 1317R. Application of a similar rule to the Implementation Agreement would suggest that the Panamanian conception of what is and what is not a governmental function ought to be given some weight.

sibilities readily come to mind. First, and most obvious, a provision whereby the United States agreed not to tax Commission employees could have been construed by Panama as a recognition of the special status of the Panama Canal Commission. Moreover, an increase in the disposable income of Commission employees (by exempting their salary from U.S. taxation) would leave more for them to spend in Panama, thereby boosting the local economy. Finally, Panama could well have been concerned that Commission employees would be uncomfortable with their new status, suddenly finding themselves on foreign soil rather than on what had been essentially U.S. territory. Panama could have feared an exodus of skilled canal operators and might have been pleased to accept a compromise that made it more attractive for Americans to stay and work for the Commission. In short, the record does not support defendant's assertion that Panama could have had no conceivable interest in whether the United States taxes Commission employees.

From the perspective of the United States, the language of Article XV could also have been viewed as advantageous. By providing that neither country could tax the salary of Commission employees, the United States avoided the possibility of Panamanian taxation and the undesirable precedent it would have set. Moreover, compromise language avoided the danger (noted by Ambassadors Bunker and Linowitz) that the issue might be used by treaty opponents as an argument against ratification. Because the loss of tax revenue was not considered significant, side-stepping the sensitive issue of sovereignty that divided the parties could well have been welcomed by the United States.

To be sure, the language of Article XV did not satisfy all of the concerns of the parties; it was certainly an uneasy compromise. Yet, the time for concluding negotiations was drawing near and there was growing pressure to bring the process to a successful conclusion. *See, e.g.*, N.Y. Times, Aug. 2, 1977, at A1, col. 5; Wash. Post, July 30, 1977, at A2, col. 3; N.Y. Times, July 30, 1977, at A1, col. 3. A compromise that left the sov-

ereignty issue unresolved and allowed each side to claim victory as to its essential concerns seems entirely plausible.

It is conceivable, of course, that in August 1977 the Panamanian delegation decided to abandon its position entirely and embrace the view advanced by the United States. However, there is simply no evidence on this record that this occurred. Certainly, the fact that the Panamanians accepted language that on its face is a *compromise* provides no support at all for the proposition that they capitulated entirely and accepted the U.S. view that they had so forcefully resisted. A fair review of the negotiating history of Article XV leads to the conclusion that in all likelihood the language adopted accurately reflects the agreement reached by the parties.

d. Defendant also suggests that the United States would not have entered into an agreement with Panama as to how it would tax its own citizens, that being an internal matter not the proper subject of negotiation with foreign governments. Despite its common sense appeal, defendant's argument fails because it is based on a false premise.

The fact is that our government regularly enters into treaties and conventions limiting the amount of tax that the United States may collect from its own citizens. The most common type of provision fits under the heading of "relief from double taxation" and precludes the United States from taxing its citizens or residents to the extent that income taxes have been paid to the other signatory to the convention. *See, e.g.*, Pakistan Treaty art. XV; Canada Treaty art. XV; Sweden Treaty art. XIV; U.S. Draft Model Income Tax Convention of June 16, 1981, art. 23, *reprinted in* Tax Treaties (P-H) ¶ 1022. Another situation where the United States has agreed to limit the tax it will impose upon its citizens is in the area of shipping and air transportation. In some treaties, the United States appears to have bound itself not to tax U.S. citizens who operate such businesses in other signatory states. *See* Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, July 22, 1954, United States-Germany, art. V, 5 U.S.T. 2768, T.I.A.S. No. 3133; Sweden Treaty art. IV.

Occasionally, the United States negotiates treaties that exempt certain types of income from taxation by both states. For example, the 1957 treaty with Pakistan contained a "tax sparing" provision. Pakistan Treaty Art. XV(1). Under that provision, American investors in Pakistan would have been allowed a credit consisting not only of taxes paid to Pakistan, but also of taxes waived by virtue of Pakistan's investment incentive program. Under the terms of this provision, certain Americans doing business in Pakistan would have been exempt from taxation by both countries. The Senate adopted a reservation preventing this provision from going into effect because of a change in Pakistani law. It did, however, express its continued interest in this type of arrangement. S.Exec.Rep. No. 1, 85th Cong., 2d Sess. 3 (1958).[19] A more recent treaty signed with Italy (but not yet ratified) exempts certain types of alimony and child support payments from taxation in both jurisdictions. Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fraud or Fiscal Evasion, Apr. 17, 1984, United States-Italy, art. 18(3); *see also* Convention with Respect to Taxes on Income and Capital, Sept. 26, 1980, United States-Canada, art. XVIII(6)(b), *reprinted in* S.Exec. T, 96th Cong., 2d Sess. (1980) (alimony and child support payments exempted from U.S. tax if Canada would exclude such payments from the recipient's taxable income). These agreements demonstrate that it is not unprecedented for the United States and another government to agree that certain parties will be exempted from taxation in both jurisdictions.

Contrary to defendant's assertion, therefore, no principle of law, policy or tradition precludes the United States from nego-

[19]The issue has arisen again from time to time. Exchange of Notes Regarding the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Aug. 1, 1977, United States-Morocco, T.I.A.S. No. 10194. Most recently it was considered during the negotiations of the tax treaty between the United States and China signed on April 30, 1984. Exchange of Notes Regarding the Agreement for the Avoidance of Double Taxation and Prevention of Tax Evasion with Respect to Taxes on Income, Apr. 30, 1984, United States-China, *reprinted in* 23 Tax Notes 701 (1984).

tiating with another government as to U.S. taxation of American citizens. When Americans live, work or invest abroad (or when citizens of other countries live, work or invest in the United States) taxation of their income becomes the concern of both states. Under those circumstances, it is not at all unusual for the two governments to apportion the amount of tax collected by each so as to assure fairness or serve some other policy. Such agreements generally contain provisions that limit how much tax the United States may collect from its own citizens and residents, in exchange for reciprocal promises from the other signatory.

The negotiating record indicates that the negotiators considered more traditional approaches such as tax sharing and tax rebating but rejected them because of objections from the United States. That the provision actually adopted is somewhat unorthodox may simply reflect the unusual circumstances surrounding the treaty negotiations and the history of the canal. However, the language adopted is not such a drastic departure from past practice as to render unthinkable the notion that it could have been the product of a deliberate compromise.

2. Deference to the Position of the United States

As the Supreme Court has often noted, the interpretation given a treaty by the Executive Branch of our government is entitled to significant deference. *E.g.*, *Sumitomo Shoji*, 457 U.S. at 184-85, 102 S.Ct. at 2379-80; *Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S.Ct. 922, 926, 6 L.Ed.2d 218 (1961); *Factor v. Laubenheimer*, 290 U.S. 276, 295, 54 S.Ct. 191, 196, 78 L.Ed. 315 (1933). This deference is based on a number of related considerations. Because the Executive Branch is involved directly in negotiating treaties, it is well situated to assist the court in determining what the parties intended when they agreed on a particular provision. Moreover, treaties normally carry significant foreign policy implications, matters peculiarly within the purview of the political branches of our government. A court should minimize intrusion in the conduct of foreign affairs by adopting the interpretation suggested by the Executive Branch whenever it can fairly do so. Finally, the Executive Branch generally has administrative authority over the implementation of international agreements. As in the case of domestic legislation, a court should generally give great weight to the interpretations of agencies charged with implementation of treaties because such agencies may possess significant expertise in the relevant subject matter.

Deference, however, is not the same as blind acceptance. There is no authority for the proposition that a court construing a treaty must follow the interpretation suggested by our government where that interpretation is unreasonable or runs contrary to what the court determines was the intent of the high contracting parties.[20] Indeed, the Supreme Court has noted that "courts interpret treaties for themselves," *Kolovrat*, 366 U.S. at 194, 81 S.Ct. at 926, and that the construction given by government agencies is "not conclusive," *Sumitomo Shoji*, 457 U.S. at 184, 102 S.Ct. at 2379.[21] *Accord Factor v.*

[20]Our State Department has, in fact, advised other states that "[u]nder the system of government of the United States, a final decision of questions involving the interpretation of laws and treaties, from the standpoint of municipal law, rests with the courts." *Aide memoire* handed the German Ambassador by the Under Secretary of State (Phillips) (May 3, 1933), MS. Department of State, file 611.623 Coal/46, *quoted in* 5 G. Hackworth, *Digest of International Law* 267 (1943).

[21]The principle that courts are not bound by the unilateral interpretations of only one of the signatories is shared by other nations. For example, the French courts have held as follows:

> [B]oth in theory and in present day judicial practice, when a governmental interpretation is unilateral—that is, when it expresses the opinion of one only of the contracting parties—it has a merely advisory effect. But, on the other hand, if the interpretation is agreed upon by both governments, there is, so to speak, a clause added to the treaty which is embodied therein, has the same authority, and, like it, has the binding force of a law.

Societe Ruegger & Boutet c. Societe Weber & Howard, 32 Revue Critique de Droit International 86, 87 (Le Tribunal Civ. de la Seine (3e Ch.)) (1934), *English synopsis in* Annual Digest and Reports of Public International Law Cases 404, 405 (H. Lauterpacht ed. 1940). The effect of a *bilateral* interpretation of the treaty, and the failure of the United States to provide such an interpretation, is discussed at greater length below. *See* pp. 146-148 *infra*.

Laubenheimer, 290 U.S. at 295, 54 S.Ct. at 196; Restatement (Second) of the Foreign Relations Law of the United States § 150 (1965) [hereinafter cited as Restatement]. The deference afforded depends upon the degree to which the interpretation proffered by our government is reasonable, unbiased and consistent with what appear to be the circumstances surrounding the treaty. As discussed below, there is much on this record that undermines the plausibility of the position taken by the United States, and hence the deference that the court is able to afford to the interpretation it advances in this litigation.

a. The Implausibility of a Drafting Error. In attempting to explain why the language of Article XV does not reflect what it claims was the intention of the parties, defendant has suggested that there has been a drafting error or at least inartful draftmanship. This explanation does not ring true. In the first place, the error the United States now argues it made is so obvious that it fairly leaps from the page even upon a cursory reading of Article XV. This is not a situation where the language used was ambiguous or imprecise; rather, language was used which, in its plain and ordinary meaning, achieves an end that the United States now repudiates.

The Supreme Court has noted that "treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties." *Rocca v. Thompson*, 223 U.S. 317, 332, 32 S.Ct. 207, 210, 56 L.Ed. 453 (1912). This observation is certainly germane here. The record discloses that (aside from our two ambassadors and miscellaneous other negotiators) at least three State Department attorneys were directly involved in the negotiation and drafting process, including the Legal Adviser himself, the highest ranking attorney in the State Department. In addition, this provision was of significance to other agencies of the United States government; the negotiating transcripts specifically mention that the Department of the Treasury was consulted on the issue. It is simply incredible

that in negotiating a sensitive and important provision with a foreign government, with the advice and assistance of so many experienced attorneys and negotiators, the representatives of the United States of America were unable to come up with language that more accurately reflected their intentions.

Nor was this a case where the language was thrown together at the last minute so that our negotiators could not take advantage of the resources at their disposal. The language of Article XV underwent significant revision in the drafting process. According to defendant, the language of Article XV was adapted from a similar provision in the Implementation Agreement pertaining to Article IV of the treaty, the so-called Status of Forces Agreement (SOFA). Agreement in Implementation of Article IV of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, art. XVI, T.I.A.S. No. 10032. A comparison between Article XV of the Implementation Agreement and the relevant Article of SOFA reveals a significant number of wording changes.[22] In addition, defendant has produced no fewer

[22]The following is the full text of SOFA Article XVI, with all words changed or deleted in drafting the Implementation Agreement emphasized:

> (1) By virtue of this Agreement, *the United States Forces* are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property, *including those imposed through contractors or subcontractors*.
>
> (2) *Members of the Forces or the civilian component*, and dependents, shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the *United States Forces or for any of the service facilities referred to in Articles XI or XVIII of this Agreement*. Similarly, *as is provided by Panamanian law*, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.
>
> (3) *Members of the Forces or the civilian component*, and dependents, shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the *United States Forces*.
>
> (4) *The Joint Committee* may establish such regulations as may be appropriate for the implementation of this Article.

than four intermediate drafts, prepared over the course of several weeks. *See* Defendant's Response to Plaintiffs' Interrogatories at 2 (no. 2) (filed June 11, 1984). The language of Article XV quite clearly was subject to careful scrutiny and manipulation before the drafters were satisfied that it accurately expressed their intentions.

It is of particular significance that during the drafting process the phrase "as provided by Panamanian law" was deleted from the second sentence of paragraph (2) of the SOFA. *See* n. 22 *supra*. This language in the SOFA firmly anchors the subject matter of its paragraph (2) to Panamanian law. Experienced attorneys would surely have appreciated the negative inference raised by deleting such language from the equivalent paragraph of the Implementation Agreement. Moreover, the deletion suggests that the drafters were aware that Panamanian law would not otherwise exempt Commission employees from taxation; this was an issue raised by Panama during the negotiations.[23] This careful tailoring of the language of Article XV and particularly the very paragraph here in issue, does not square with defendant's theory of error through unthinking adoption of boilerplate language.

Finally, Status of Forces Agreements with other countries contain provisions that are similar to Article XV of the Implementation Agreement, except for the fact that they are very specific about which country is providing the tax exemptions. For example, the NATO SOFA provides that "[m]embers of a force or civilian component shall be exempt from taxation *in the receiving State*." North Atlantic Treaty, June 19, 1951, art. X(1), 4 U.S.T. 1792, T.I.A.S. No. 2846 (emphasis added); *see also* Agreement Under Article IV of the Mutual Defense Treaty Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, United States-Korea, art. XIV(2), 17 U.S.T. 1677, T.I.A.S. No. 6127 (exemption from payment of "any Korean taxes to the

[23]Defendant's Brief at 79 (Statement of Mr. Rodrigo Gonzalez during the July 14, 1977, negotiating session).

Government of the Republic of Korea"); Agreement Regarding Status of United States Forces in Australia, May 9, 1963, United States- Australia, art. 6(1), (2), 14 U.S.T. 506, T.I.A.S. No. 5349 (exemption from "Australian tax" and "taxation under the laws of the Commonwealth of Australia"); Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, United States-Japan, art. XIII(2), 11 U.S.T. 1652, T.I.A.S. No. 4510 (exemption from payment of "any Japanese taxes to the government of Japan"); Agreement Regarding Status of United States Forces in Lebanon, July 31-Aug. 6, 1958, United States-Lebanon, 10 U.S.T. 2166, T.I.A.S. No. 4387 (exemption from "any form of taxation in Lebanon"). In the words of Mr. Chief Justice Hughes, "[w]e must assume that the representatives of the United States had these clauses before them when they negotiated [the Implementation Agreement] and that the omission was deliberate." *Valentine v. United States ex rel. Neidecker*, 299 U.S. at 13, 57 S.Ct. at 104.

b. The Failure of the United States to Clarify the Language of Article XV Before the Treaty Went Into Effect. It is not entirely clear when the United States first became aware of the error it now claims is part of Article XV of the Implementation Agreement. The record does reveal that two weeks after the treaty documents were first signed, there were written communications within the government noting the need to clarify the issue. Memorandum from Marcia Field to Richard Goodman (Sept. 21, 1977), *reprinted in* Submission Pursuant to the Judge's Order Filed June 6, 1984, at Exhibit E (filed June 11, 1984). Despite this very early notice, the record discloses a remarkable degree of reluctance on the part of the United States to seek a clarification of the Article XV language from Panama. That reluctance casts doubt upon defendant's assertion that the Article XV language was an error rather than a compromise. The court notes at least three opportunities for clarifying the language of Article XV even after it was initially accepted by Panama but long before the treaty documents went into force.

First. Immediately following the Implementation Agreement there is an Agreed Minute consisting of 21 numbered paragraphs (many having several sub- paragraphs) each of which specifically refers to a portion of the Implementation Agreement. Each paragraph and sub-paragraph provides explanatory and clarifying information as to the understanding of the negotiators pertaining to various portions of the Implementation Agreement. *See* S.Exec.Rep. No. 12, at 35. The Minute thus serves as an official negotiating history to clarify or round out terms of the agreement that were thought to be unclear or ambiguous. No paragraph of the Minute refers to Article XV of the Implementation Agreement.

Second. There was an exchange of notes between the representatives of the United States and Panama on September 7, 1977, the date the treaties were signed. This was approximately a month after agreement had been reached on the language of Article XV. The notes dealt with a number of matters not covered by the treaty documents and also supplied clarifications and assurances as to the effect of the various provisions. *See, e.g.*, Exchange of Notes Relating to Postal Services, Sept. 7, 1977, United States-Panama, *reprinted in* S.Exec.Rep. No. 12, at 276 (exchange of notes clarifying operation of Article X of Agreement in Implementation of Article IV).[24] There was no note exchanged pertaining to Article XV of the Implementation Agreement, at that time or since.

Third. During testimony by Herbert J. Hansell, the Department of State's Legal Advisor, before the Foreign Relations Committee, Senator Richard Stone raised a serious question about the meaning of Article XV. Senator Stone cited newspaper reports that Zone residents were interpreting Article XV as exempting them from U.S. income taxes, much as plaintiff now claims. The Senator expressed concern that the matter would spawn litigation and suggested that the language

[24]An exchange of notes to correct errors or omissions in an executive agreement is entirely consistent with past practice of the United States. *See* 14 M. Whiteman, *Digest of International Law* 134-36 (1970).

be clarified by means of a formal understanding attached to the ratification documents. *Treaty Hearings* Part 1, at 268. Mr. Hansell strongly resisted the suggestion but promised that "we will find a way to avoid this" and Senator Stone dropped the subject. *Id*. at 269.

Senator Stone's suggestion that the meaning of Article XV be clarified by means of an understanding was sensible and consistent with established practice. It is not at all unusual for the Senate to approve a treaty subject to a formal declaration modifying or clarifying its terms. Where the declaration exempts the United States from a portion of the treaty, or changes one of its terms, it is called a reservation. Restatement § 124; Vienna Convention art. 2(1)(d), 63 Am.J.Int'l L. 876. Where the declaration merely sets forth the Senate's interpretation of a basic term of the agreement, without purporting to change it, it is called an understanding. Restatement § 124 comment c; 14 M. Whiteman, *Digest of International Law* 137-38 (1970) [hereinafter cited as Whiteman, *Digest*].

Reservations and understandings are communicated to the other signatory before the formal exchange of ratification documents. If the terms of the reservation or understanding are acceptable, the other party will affirmatively communicate its acceptance or at least will fail to object. The party will then be bound by the treaty as so modified or clarified. Restatement § 124; D.H. Miller, *Reservations to Treaties* 76-80 (1919) [hereinafter cited as Miller, *Reservations*]; 14 Whiteman, *Digest* 138-39. *See generally* Bishop, 103 Receuil de Cours 276-302. This principle was recognized by the Supreme Court as established over a century and a quarter ago:

> [I]t is too plain for argument that where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged—the declaration thus annexed is a part of the

> treaty and as binding and obligatory as if it were inserted in the body of the instrument.

Doe v. Braden, 57 U.S. (16 How.) 635, 656, 14 L.Ed. 1090 (1853).[25] Only if the other signatory objects to the proposed reservation or understanding will the parties have to resolve their differences by further negotiation. However, to be effective,

> [t]he declaration must be *communicated* to the other Party . . . to the treaty. This is obviously necessary, for a treaty is an agreement, and failure to communicate such a declaration would deprive it of any international effect.

Miller, *Reservations* 77 (emphasis original).[26]

If both sides intended that Article XV exempt employees of the Commission only from Panamanian taxes, following Senator Stone's suggestion would have clarified the issue once and for all. The Senate in fact considered a number of reservations and understandings to the treaty package and passed no fewer than 21 of them. *Senate Debate on the Panama Canal Treaties* 411-13, 495-96. Each of these was accepted by Panama and became part of the treaty package without the need for reopening negotiations. *Id.* at 549-52, 557-59. Prudence, candor to our negotiating partner and fairness to the American public, which would have to bear the cost of clarifying the issue through

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[25]The practice of attaching reservations to treaties dates back at least to 1795 when the Senate gave its advice and consent to ratification of the Treaty of Amity, Commerce and Navigation between the United States and Great Britain (commonly known as the Jay Treaty), subject to certain conditions. 8 Stat. 116, T.S. No. 105. One commentator estimated that between 1800 and 1929 the Senate had introduced reservations into at least 66 bilateral treaties. Owen, *Reservations to Multilateral Treaties*, 38 Yale L.J. 1086, 1091 (1929).

[26]In *Sullivan v. Kidd*, 254 U.S. 433, 442, 41 S.Ct. 158, 161, 65 L.Ed. 344 (1921), the Court rejected the argument that a treaty with Britain ought to be interpreted in accordance with the intention of the British negotiators because it found no evidence that their position had been made known to the United States.

litigation,[27] all strongly supported Senator Stone's suggestion that the language of Article XV be clarified through a formal understanding.

The United States argues that such an understanding would have been superfluous because the language of Article XV is clear, because taxation of U.S. citizens is purely an internal matter and because Panama could have no legitimate interest in how the United States construes this language. As discussed above, these assertions are subject to significant doubt. Nevertheless, even if one were to assume that the United States was fully justified in its views, the refusal to confront Panama and seek its concurrence is so striking a departure from the practice of the United States in the field of public international law as to give one serious pause.

Even the most cursory review of how the United States has conducted itself in this delicate area reveals unflagging adherence to the principle that potential disagreements, even of the most remote kind, are resolved through concurrence of the signatory parties, preferably before the treaty goes into force. *Doe v. Braden*, 57 U.S. (16 How.) 635, 14 L.Ed. 1090 illustrates this point. The case involved a treaty whereby Spain ceded certain territories to the United States. The treaty was signed by the President and approved by the Senate. However, before ratification instruments could be exchanged, our government learned of a claim to the territory by a third party. *Id.* at 655. Although the Secretary of State was satisfied that this claim was entirely without merit, he "deemed it his duty to place the matter beyond all controversy before the ratifications were exchanged." *Id.* The United States therefore insisted on the inclusion in the treaty documents of a written declaration expressing "the positive understanding of the negotiators on both sides" that the claim in question had been annulled. *Id.* The

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[27]At least 42 lawsuits, involving perhaps hundreds of plaintiffs, have presented the issue to this and other courts. *See* n. 9 *supra*. The cost borne by the plaintiffs, the defendant and the judicial system in resolving this issue through piecemeal litigation has been, and will continue to be, substantial.

treaty then had to be resubmitted to the Senate and only then were ratification instruments exchanged, bringing the treaty into force.

Our Department of State has, moreover, consistently taken the position that one signatory to an international agreement cannot unilaterally determine what is and what is not of significance to the other signatory. Even matters that are merely of a clarifying nature, or which purport to confirm the view of the negotiators, must be formally presented if they are to become part of the treaty. This position is perhaps best expressed in advice given to Congress by a representative of the Department of State:

> He [Mr. Beverage] asked what kind of reservation would not require renegotiation of a treaty. I emphasized that it was impossible to define such a reservation because each other country concerned has the right to decide whether or not a particular reservation modifies the text or would affect its interests in the application of the treaty. In reply to his statement that he had in mind a reservation which merely clarified the intention of the negotiators, I said that, nevertheless, the other countries concerned would still be entitled to their views with respect to the effect of the reservation.

Office of the Legal Adviser, Treaty Branch (Bevans), "Reservations to treaties," memorandum of conversation with Mr. Beverage of Senator Langer's office, July 20, 1949, MS. Department of State, file 711.00/7-2049, *quoted in* 14 Whiteman, *Digest* 140.

Much thought has also been given to whether matters that are of purely domestic concern to one of the negotiating parties must be presented for the approval of the other party. The advice given by the State Department again clarifies the position of the United States:

> He also inquired as to whether a simple reservation relating to "a purely domestic matter", such as "one requiring approval by two-thirds of the Senators of any arms assistance", would have to be approved by other countries. I explained that while the reservation may be considered by the United States as relating to a purely domestic matter, the fact that our ratification is given subject to a reservation would give the other countries concerned the right to consider whether or not the reservation affected our international obligations under that treaty or would affect the application of the treaty in our relations with other countries.

Id.

The position traditionally taken by the United States is so intuitively correct that it requires little elucidation. The fact is that even exercising the utmost good faith, one country simply cannot take into account all of the interests, points of view, political and social factors, perceived advantages and disadvantages, realities and appearances, and other considerations that define another country's self-interest. As an equal sovereign, each country is entitled to make up its mind as to whether a particular provision of a treaty, or a reservation or understanding attached thereto, does or does not affect its interests. It has been traditional, therefore, for our government to inform its negotiating partners of even those matters that it believes are of no consequence to them, and to allow them an opportunity to assent or object. *See, e.g., Power Authority of New York v. Federal Power Commission*, 247 F.2d 538 (D.C.Cir.), *vacated as moot sub nom., American Public Power Association v. Power Authority of New York*, 355 U.S. 64, 78 S.Ct. 141, 2 L.Ed.2d 107 (1957).

The *Power Authority of New York* case involved a treaty with Canada concerning use of the water of the Niagara River. In ratifying the treaty, the Senate attached a stipulation that reserved to the United States the right "to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States share of the waters" made available through the treaty. *Id.* at 539. Our Department of State advised the

Canadian Government of this "reservation" but took the position that this was a purely internal matter, of no interest to Canada. Canada responded by diplomatic note, accepting the position of the United States that this was a matter relating "only to the internal application of the Treaty within the United States (that did) not affect Canada's rights or obligations under the Treaty." *Id.* at 541. The court relied upon this disclaimer in determining that the reservation was not a matter of interest to Canada, and therefore effectively not a part of the treaty. *Id.*[28]

These principles have been applied so uniformly by our State Department in dealings with other governments, and by other governments in their dealings with us, that they can fairly be characterized as reflecting the universally accepted practice in the area of international law. *See generally* 14 Whiteman, Digest 137-93; 5 G. Hackworth, *Digest of International Law* 93-153 (1943) [hereinafter cited as Hackworth, *Digest*]. Indeed, a memorandum prepared by the State Department and transmitted to the United Nations stated the proposition as follows:

> Even in the case of an "understanding" . . . it is the *invariable rule* in regard to bilateral treaties to obtain the consent of the other country before ratifying the treaty.

U.S. Department of State, *The Law of Treaties as Applied by The Government of the United States of America* 102 (Mar. 31,

[28]Additional examples of this practice are abundant. For example, in giving its advice and consent to the treaty establishing friendly relations with Austria signed on August 24, 1921, the Senate included a series of understandings dealing with matters of U.S. domestic law. Prior to the exchange of ratification instruments, Secretary of State Hughes wrote to Austria and advised that these understandings "of course relate merely to matters of domestic policy and procedure, which are of no concern to the Austrian Government." Letter from Secretary of State Hughes to Commissioner Frazier of Austria (Oct. 24, 1921), MS. Department of State file 711.63119/22b, *quoted in* 5 G. Hackworth, *Digest of International Law* 120-21 (1943). The Austrians were satisfied with this explanation and approved the exchange of ratification documents. Letter from Commissioner Frazier to Secretary of State Hughes (Nov. 8, 1921), MS. Department of State file 711.63119/26, *cited in* 5 Hackworth, *Digest* at 121.

1950), *quoted in* Bishop, 103 Receuil des Cours 304 (emphasis added).[29] The failure of our government to comply with this established practice throughout the treaty ratification process, despite serious questions on the proper construction of Article XV raised by Congress, the press and within the Executive Branch itself, diminishes further the deference that the court can accord defendant's interpretation of the language in question.

Over half a century ago Charles Evans Hughes wrote the following in response to a Senate inquiry as to the types of reservations or understandings that might properly be attached to the ratification of the Treaty of Versailles:

> Statements to safeguard our interest which clarify ambiguous clauses in the covenant by setting forth our interpretation of them, and especially when the interpretation is one which is urged by the advocates of the covenant to induce support, can meet with no reasonable objection. It is not to be supposed that such interpretations will be opposed by other parties to the treaty, and they will tend to avoid disputes in the future.

58 Cong.Rec. 3302 (1919). The interpretation of Article XV offered by our Department of State to the Senate can fairly be

[29]Marjorie Whiteman, Assistant Legal Adviser to the United States Department of State, expressed the same view in almost identical terms:

> A statement designated as a "reservation" or "reservation and understanding" contained in an instrument of ratification of a treaty may be regarded as nothing more than a clarifying statement or declaration short of a reservation if it does not, in fact, constitute a qualification or modification of the substantive terms of the treaty. Nevertheless, in the case of a bilateral treaty *it is the invariable practice*, prior to the making of arrangements for the exchange of ratifications and sometimes even prior to ratification of the treaty, *for the government making the statement or declaration to notify the other government thereof in order that the latter may have an opportunity to accept, reject, or otherwise express its views with respect thereto.*

14 Whiteman, *Digest* 188-89 (emphasis added). The *Digest* catalogues and generally reflects the official position of the United States on questions of international law.

characterized as "urged by the advocates of the covenant to induce support." If the defendant is correct that it concerns a purely internal matter of no consequence to Panama, then "it is not to be supposed that such interpretation[ ] [would have been] opposed by [the] other part[y] to the treaty." Under such circumstances, the clarification of the meaning of Article XV by means of an understanding, as suggested by Senator Stone, a diplomatic note, or some other means that secured concurrence from Panama on this simple point "[could] meet with no reasonable objection . . . [and would have tended] to avoid disputes in the future." Since defendant has offered no satisfactory explanation for its failure to follow established practice in this sensitive area, the court must infer that officials of the Department of State who were familiar with the treaty negotiations (and had access to the then classified negotiating transcripts) feared that Panama would refuse to concur in their interpretation of Article XV and for that reason refused to seek its consent.

c. Additional Considerations.

A number of other factors, each of them perhaps less weighty than the foregoing, conspire to further undermine the deference the court is able to afford the interpretation offered by the United States. It is worth mention, for example, that in this case the United States is a litigant—a party with a financial interest in the outcome of the proceedings. In such circumstances it is appropriate to scrutinize its position more closely than where it is participating as amicus curiae, its only interest being the proper conduct of our foreign relations and the correct interpretation of our laws. *See, e.g., Sumitomo Shoji*, 457 U.S. 176, 102 S.Ct. 2374, 72 L.Ed.2d 765; *Kolovrat*, 366 U.S. 187, 81 S.Ct. 922, 6 L.Ed.2d 218.

Moreover, this case is not like *Factor v. Laubenheimer*, 290 U.S. at 295, 54 S.Ct. at 196, or *Great-West Life Assurance Co.*, 678 F.2d 180, 230 Ct.Cl. at 491, where the construction offered by the United States had remained unchallenged for decades and therefore was entitled to deference by virtue of its longevity and consistency. *Cf. Consumer Products Safety Commission v. GTE Sylvania*, 447 U.S. 102, 120, 100 S.Ct. 2051, 2062, 64 L.Ed.2d 766 (1980) (lack of longstanding contemporaneous administrative construction of statute undermines degree of deference to be afforded agency's interpretation). Here, the controversy over what this language means arose within days of its initial adoption, in ample time for the United States to obtain a correction or clarification before the ratification process was completed. Nor is the language of Article XV so complex, or its subject matter so specialized, that deference to administrative expertise is of particular relevance. *Cf. Great-West Life Assurance Co.*, 678 F.2d 180, 230 Ct.Cl. at 481.

Finally, defendant has offered no factual basis supporting a significant degree of administrative deference. Indeed, it appears that the interpretation of Article XV proffered by the United States consists of little more than the best hopes of State Department officials, many of whom had no direct involvement in the negotiation of this provision. The letter transmitting the section-by-section analyses to the Senate states that they were prepared "by members of the treaty negotiating team and have been approved by the offices of the State and Defense Departments directly involved in the negotiations." S.Exec.Rep. No. 12, at 127. It is interesting to note, however, that there is no evidence that anyone involved with the actual negotiation of Article XV of the Implementation Agreement drafted or reviewed these analyses. In response to a discovery request, defendant admitted that the analyses were prepared after the negotiations had been completed and after the treaty documents had been signed. Defendant's Response to Plaintiff's Second Request for Admissions at 2 (Nos. 21 and 22) (filed June 11, 1984). Moreover, defendant disclosed that the analyses were drafted by two individuals, Michael Kozak and Geraldine Chester, who were not present at any of the negotiating sessions during which we know that the substance of Article XV was discussed. *Id.* (No. 22b(A)) (Mr. Kozak and Ms. Chester were present at the July 18, 1977, negotiating session where there appears to have been some general discussion of

the Implementation Agreement but not of Article XV or the subject of taxation.) Defendant admits that it does not know who was present when the Article XV language was proposed or discussed. Defendant's Response to Plaintiffs' Interrogatories at 3 (No. 10) (filed June 11, 1984). There is no evidence, therefore, that the supposedly authoritative interpretations of the language proffered by the United States were ever reviewed or approved by those who were involved in face-to-face negotiations with Panama on the subject.

3. The Legislative History

Defendant suggests that the Senate consented to the ratification of the Panama Canal Treaty with the understanding that Article XV of the Implementation Agreement exempted Commission employees only from Panamanian taxation and not from United States taxation. Defendant cites in support of its proposition the colloquy between Senator Stone and the State Department's Legal Adviser, Mr. Hansell, *see* p. 138 *supra*, and the Report of the Senate Foreign Relations Committee, which incorporated the State Department's section-by-section analysis.

Even in the case of purely domestic legislation, "[r]eliance on legislative history in divining the intent of Congress is . . . a step to be taken cautiously." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26, 97 S.Ct. 926, 941, 51 L.Ed.2d 124 (1977); *see Hart v. United States*, 585 F.2d 1025, 218 Ct.Cl. 212, 221-31 (1978). That caution must be even greater where the document in question grows out of sensitive negotiations with a foreign government whose intentions and views can only be expressed through treaty language and other documents attached to the ratification process.

It should first be noted that the legislative history cited by defendant is not as compelling as it would have the court believe. The most one can say about the conversation between Senator Stone and Mr. Hansell is that one member of the Senate Foreign Relations Committee may have been persuaded by the position taken by the Executive Branch; there is

no indication that any other members of the Committee shared those views. "[O]rdinarily even the contemporaneous remarks of a single legislator . . . are not controlling in analyzing legislative history." *Consumer Products Safety Commission*, 447 U.S. at 118, 100 S.Ct. at 2061. The Committee Report merely recites the interpretation offered by the State Department without elaboration or discussion. Of course, there was no reason the Committee should have questioned the interpretation offered by the Executive Branch. The issue, on its face, appeared to be merely one of domestic tax law; the negotiating transcripts, which place the matter in a wholly different light, were still classified and there is no indication that they were presented to or examined by the Committee.

In any case, all three branches of our government have taken the position that even the clearest expression of legislative intent cannot change the legal effect of an international agreement to which the Senate has given its approval. In *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 179-80, 22 S.Ct. 59, 60-61, 46 L.Ed. 138 (1901), the Court held that a Senate Resolution that had not been brought to the attention of Spain, the other signatory to the treaty, was "absolutely without legal significance." Charles Evans Hughes, in his letter to the Senate in 1919, considered this proposition as black letter law: "The adoption of resolutions by the Senate setting forth its views will not affect the obligations of the covenant if it is in fact ratified without reservations which constitute part of the instrument of ratification." 58 Cong.Rec. 3302 (1919).

The Senate thoroughly considered the same issue during the deliberations over the Kellogg-Briand Peace Treaty of August 27, 1928. *See* 70 Cong.Rec. 1655 *et seq.* (1929). After considerable debate, the Senate concluded that a legislative report not mentioned or included in the resolution of ratification could not modify or amend the treaty in any way. *See id.* at 1730. This view was accepted by the Department of State and related to other signatories of the treaty. Telegram from Secretary of State Kellogg to Ambassador to Great Britain (Jan. 17, 1929) & Telegram from Secretary Kellogg to Ambassador to France (Jan. 18, 1929), *cited in* 5 Hackworth, *Digest* 153.

The State Department has consistently taken this view. For example, on May 24, 1907, Secretary of State Root wrote Dominican Republic Minister Joubert concerning the effect of a resolution adopted by the Dominican Congress in approving a convention with the United States. Secretary Root requested that the resolution—which explained the Dominican Congress' interpretation of the convention—not be included in the instrument of ratification because to do so might change the legal effect of the treaty, making it impossible for our President to accept the ratification. On the other hand, Secretary Root took the position that if the legislative report was not attached to the ratification documents, it could have no legal effect on the relationship between the parties, even though the United States was fully aware of it. Letter from Secretary of State Root to Dominican Minister Joubert (May 24, 1907), *cited in* 5 Hackworth, *Digest* 125-26.

There are important policies behind the refusal to give legal effect to expressions of intent that are not contained in the ratification documents and thereby made part of the formal agreement between the parties. Unless such statements are included in the ratification instruments, it is impossible to determine whether the confirming body (here the Senate) assented to the proposed interpretations. *See Fourteen Diamond Rings*, 183 U.S. at 180, 22 S.Ct. at 61. Here, for example, the Committee Report, which reflects the State Department's section-by-section analyses, was voted upon by the members of the Foreign Relations Committee but not by the full Senate. Even if one were persuaded that the Foreign Relations Committee accepted all of the State Department's analyses, there is no assurance that two-thirds of the full Senate would have. As the Court of Claims cautioned in *Hart*, "[t]o legislate by committee report would raise a [serious] constitutional problem." 585 F.2d 1025, 218 Ct.Cl. at 222. In addition, where the document is not part of the ratification protocol, there is no assurance that the President has given his approval to it. *See New York Indians v. United States*, 170 U.S. 1, 23, 18 S.Ct. 531, 536, 42 L.Ed. 927 (1897).

Perhaps most important, foreign governments dealing with us must rely upon the official instruments of ratification as an expression of the full intent of the government of the United States, precisely as we expect from foreign governments. The Supreme Court confronted this very issue in *New York Indians* where the United States relied upon a provision in the resolution of ratification not included in the President's proclamation ratifying the treaty. The Court held the resolution to be of no effect, stating as follows:

> There is something . . . which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it.

Id. More recently, Professor Bishop stated the same proposition in more general terms:

> The fundamental basis remains, that no state is bound in international law without its consent to the treaty. This is the starting point for the law of treaties, and likewise for our international law rules dealing with reservations.

Bishop, 103 Receuil des Cours 255.

The Senate managed to attach a multitude of reservations, understandings and other modifications to the treaties with Panama as a condition for giving its advice and consent. Each of those instruments was approved by two-thirds of the Senate, presented by the President and accepted by Panama. It would be entirely inappropriate—and inconsistent with the established policy of the United States—to now modify the agreement on the basis of views expressed in committee and never approved by the Senate or presented to Panama for its concurrence or rejection. *See New York Indians*, 170 U.S. at 22-23, 18 S.Ct. at 536.

In sum, nothing presented by defendant supports the finding that Panama and the United States "intended to agree on

something different from [illegible]ppearing on the face of" Article XV of the Implementation Agreement. "Without such a finding the agreement must be interpreted according to its unambiguous language." *Choctaw Nation*, 318 U.S. at 432, 63 S.Ct. at 678.

C.
ADDITIONAL CONSIDERATIONS

The preceding section of the opinion was premised on the court's conclusion that the language of Article XV is clear and unambiguous. Even if one were to take the position that the language of Article XV is ambiguous, there is, nevertheless, much reason to resolve the ambiguity in favor of the interpretation offered by plaintiff.

1. The Failure of the United States to Present Evidence of Panama's Intent

Even under the best of circumstances, it is very difficult for the court of one signatory state to understand and appreciate the intentions, interests and motivations of another signatory state. For one thing, states are not always of a single mind; different officials or agencies may hold different views as to what is in the state's interest.[30] It is therefore important to obtain the *official* position of the government in question. Then again, governments are known to change their official position as to how a treaty ought to be interpreted. For example, in

[30] *Sumitomo Shoji* provides an example of this. In that case, the United States presented an interpretation of the disputed treaty provision from Japan's Ministry of Foreign Affairs (MFA). Brief for the United States as Amicus Curiae at 19-20 & n. 11, *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982). The interpretation offered by MFA supported the respondents in that case. At the same time, Japan's Ministry of International Trade and Industry (MITI) filed an amicus curiae brief which presented a position that "might be understood to support [petitioner's] position on this issue." *Id.* at 20 n. 11. The United States requested that the Supreme Court accept MFA's position because "MFA is the Office of the Government of Japan responsible for interpretation of the Treaty." *Id.*

Sumitomo Shoji, the Department of State initially interpreted the treaty in a manner that supported petitioner; later, it interpreted the treaty consistent with the view offered by respondents. The Supreme Court was not troubled by this lack of consistency. It accepted the official interpretation presented at the time the case was pending for decision. 457 U.S. at 184 n. 9, 102 S.Ct. at 2379 n. 9.

As has been noted, there is little doubt as to the interpretation our government places on Article XV of the Implementation Agreement. However, the record is devoid of any statement of the official Panamanian position. The court has discussed at length the possibilities for obtaining a clarification of the language in question before the treaty was ratified. *See* pp. 137-142 supra. In addition, there has been ample opportunity for the United States to obtain Panamanian concurrence for its views even *after* the treaty went into effect.

One method would have been through the administrative mechanism established by the Implementation Agreement itself. Article II of the agreement provides for the establishment of a Coordinating Committee composed of representatives of the United States and Panama. Paragraph 4 of Article XV authorizes the Coordinating Committee to "establish such regulations as may be appropriate for the implementation of this Article." The Coordinating Committee was in fact established. Agreement Establishing Coordinating Committee, Oct. 1, 1979, United States-Panama, T.I.A.S. No. 10044. Its charter covers a broad array of functions, largely in resolving points of friction that might arise under the Implementation Agreement. The Coordinating Committee has been in operation for about four years but has not issued any regulations pertaining to taxation. Letter from John L. Haines, Jr., Deputy United States Representative to the Coordinating Committee, to Patricia M. McDermott, Librarian, United States Court of Appeals for the Federal Circuit (June 1, 1984) (filed June 12, 1984).

Issuance of regulations that support defendant's position would have been an effective and time-honored method for

clarifying language in the Implementation Agreement that the United States claims is ambiguous. Of course, promulgation of any such regulations would require the concurrence of the Panamanian member of the Coordinating Committee. However, if defendant is correct in its assertion that paragraph 2 of Article XV was meant to exempt Commission employees only from Panamanian taxes, such concurrence should not have been difficult to secure. Nevertheless, defendant has failed to avail itself of this opportunity to clarify the language of the Implementation Agreement.

In addition, defendant might have obtained a diplomatic note or other official indication from Panama as to its view of this matter. Indeed, after expressing considerable skepticism as to defendant's position, Feb. 23 Transcript at 52, 65-66, the court recessed for two weeks to give defendant an opportunity to consider supplementing the record by obtaining an indication from Panama as to its intentions in agreeing to the language of Article XV. At the next hearing on the matter, defense counsel informed the court that no clarification would be requested or obtained from Panama. Mar. 8 Transcript at 3, 8. The court then took the unusual step of inviting an appearance by a more senior attorney to ensure that the implications of this decision were fully understood and appreciated by defendant. Defense counsel and her supervisor appeared at a hearing later the same day and the court once again stated that it found plaintiff's presentation persuasive but urged defendant to supplement the record by obtaining clarification from Panama or through some other means. Id. at 26-27, 39-40, 43-45, 49-50. Despite numerous statements by the court that it would decide the case in favor of plaintiff on the record as presented, defendant steadfastly refused the opportunity to supplement the record.

The notion that defendant can obtain clarifying statements as to the meaning of treaty language while a case is in litigation did not originate with this court. From time to time, our government has used diplomatic channels to obtain the concurrence of its negotiating partner where ambiguous treaty

language has been the subject of litigation. The most recent example of which the court is aware occurred in *Sumitomo Shoji*, 457 U.S. 176, 102 S.Ct. 2374, 72 L.Ed.2d 765. That case involved a suit by female employees against the New York subsidiary of a Japanese trading company; plaintiffs claimed that the company discriminated in favor of Japanese males in promotions to executive positions. Resolution of the dispute turned on interpretation of ambiguous language in a treaty between the United States and Japan. The United States appeared as amicus curiae while the case was pending before the Supreme Court. As part of its presentation, it referred to a cable from the Japanese Ministry of Foreign Affairs to the United States Embassy in Tokyo. The cable gave an interpretation of the treaty that was consistent with the interpretation of our government. *Id.* at 183-84 & n. 10, 102 S.Ct. at 2378-79 & n. 10. The Supreme Court obviously was impressed by the submission and relied upon it. *Id.* Similarly, in *Kolovrat*, the Supreme Court was swayed by an exchange of notes between our government and Yugoslavia's "to the effect that the 1881 Treaty, now and always, has been construed" in the manner suggested by the United States. 366 U.S. at 194, 81 S.Ct. at 926.

Obtaining a diplomatic note interpreting an ambiguous treaty provision makes sense because, after all, the court must divine the intent of *both* parties to the agreement. Of course, it would be entirely plausible for defendant to take the position that such clarifications will not be sought because the practice might unduly burden our relations with other countries.[31] De-

[31]The court has been exceedingly careful to give appropriate deference to the political branches of our government on matters involving foreign affairs. *See, e.g., Langenegger v. United States*, 5 Cl.Ct. 229 (1984), *appeal docketed*, No. 84-1420 (Fed.Cir. July 10, 1984); *Shanghai Power Co. v. United States*, 4 Cl.Ct. 237 (1983), *appeal docketed*, No. 84-860 (Fed.Cir. Feb. 28, 1984). Even in this case, the court has examined a number of documents on an ex parte, in camera basis to avoid publication of classified material. *See* p. 131 & n. 15 *supra*. However, defendant raised *no* suggestion, however veiled, that approaching Panama on this issue would have adverse foreign policy implications. Indeed, defense counsel represented that she had not even discussed the court's suggestion with representatives of the Department of State. Mar. 8 Transcript at 8.

fendant has not, however, taken this position. In fact, it appears perfectly willing and able to obtain such clarifications when it believes it advantageous to do so.

It is quite clear from the repeated exchanges on this point between the court and counsel that the decision not to seek clarification from Panama was based exclusively upon counsel's assessment of the litigation risks. *See, e.g.*, Mar. 8 Transcript at 44, 49-50. Under these circumstances, the court must draw a negative inference from defendant's refusal to "produc[e] evidence peculiarly within its possession." *Paccon, Inc. v. United States*, 399 F.2d 162, 185 Ct.Cl. 24, 40 (1968); *accord Borror v. Herz*, 666 F.2d 569, 573-74 (C.C.P.A.1981); *California-Pacific Utilities Co. v. United States*, 194 Ct.Cl. 703, 718 (1971).[32] The negative inference means, at the very least, that any ambiguity in the language of Article XV must be construed against defendant.

2. Established Principles of Treaty Construction

Courts are naturally reluctant to give treaties a construction contrary to that proffered by the Executive Branch, although they will do so from time to time. *See, e.g., Johnson v. Browne*, 205 U.S. 309, 27 S.Ct. 539, 51 L.Ed. 816 (1907); *New York Indians*, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927. However, the step is never to be taken lightly or without careful consideration of the arguments offered by the United States in support of its position. Yet, the court must also be mindful of the fact that it has special responsibilities in interpreting an international agreement. Aside from its normal duty to uphold the law as written, the court must also safeguard the dignity and credibility of our nation in its dealings with other sovereigns. As the Supreme Court noted a century ago:

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[32]Of course, defendant alone is in a position to solicit and present the official view of Panama. Plaintiff has already done more than can be expected in this regard. *See* p. 131 & n. 16 supra. Any further efforts by plaintiff might run afoul of U.S. law. *See* 18 U.S.C. § 953 (1982).

> Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected.

Chew Heong v. United States, 112 U.S. 536, 540, 5 S.Ct. 255, 256, 28 L.Ed. 770 (1884). The Court has therefore urged again and again that treaties be interpreted in a spirit of "*uberrima fides*," that is, with the most scrupulous good faith. Tucker v. Alexandroff, 183 U.S. 424, 437, 22 S.Ct. 195, 200, 46 L.Ed. 264 (1902). More specifically, the Court stated:

> As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or other principles of personal liberty which lie at the foundation of our jurisprudence.

Id.; accord Santovincenzo, 284 U.S. at 40, 52 S.Ct. at 84; *Jordan v. Tashiro*, 278 U.S. at 127; see Vienna Convention art. 26, 63 Am.J.Int'l L. 884 ("[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith"). In addition, the Court has noted that "[w]hen a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred." *Nielsen v. Johnson*, 279 U.S. 47, 52, 49 S.Ct. 223, 224, 73 L.Ed. 607 (1929); *accord Bacardi Corp. v. Domenech*, 311 U.S. 150, 163, 61 S.Ct. 219, 226, 85 L.Ed. 98 (1940); *Jordan v. Tashiro*, 278 U.S. at 127, 49

S.Ct. at 48; *Geofroy v. Riggs*, 133 U.S. at 271-72, 10 S.Ct. at 298-99.[33]

Even if defendant was under the impression that the provision only limits Panama's right to tax Commission employees, it must be remembered that it was the United States that proffered the language in question to Panama. Any ambiguity in the language must therefore be construed against the United States unless there is convincing evidence showing that both parties interpreted the provision in the same manner. Restatement (Second) of Contracts § 206 (1979).[34] As previously noted, no such evidence exists. Moreover, the United States appears to have had notice of the ambiguity at a very early stage in the process, long before the agreement went into effect. Its failure to alert its negotiating partner of the problem and to obtain a clarification means that the language should be construed as Panama would read it.[35] The court's responsibility to act in good faith toward nations that enter into treaties with the United States requires no less.

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[33]In this case, the construction urged by plaintiff is further supported by the rule that laws affecting taxation must be construed strictly in favor of the taxpayer. *Crooks v. Harrelson*, 282 U.S. 55, 61, 51 S.Ct. 49, 51, 75 L.Ed. 156 (1930); *Estate of Renick v. United States*, 687 F.2d 317, 231 Ct.Cl. 457, 463 (1982).

[34]While this rule of construction is most frequently applied to contracts between private parties, it is equally applicable where the contracting parties are sovereign states. *See, e.g.*, Opinion of Umpire Parker, Mixed Claims Commission, *The Lusitania Cases (United States v. Germany)*, Decisions and Opinions 17, 31, *quoted in* 5 Hackworth, *Digest* 230. *See also* 5 Hackworth, Digest 234.

[35]One Commentator has noted as follows:

> The performance of treaties is subject to an overriding obligation of mutual good faith. This obligation is also operative in the sphere of the interpretation of treaties, and it would be a breach of this obligation for a party to make use of an ambiguity in order to put forward an interpretation which it was known to the negotiators of the treaty not to be the intention of the parties.

A. McNair, *The Law of Treaties* 465 (1961).

CONCLUSION

The question presented in this case is not whether the Implementation Agreement (or indeed the Panama Canal Treaty package as a whole) is a wise policy; policy must be left to the political branches of our government. Nor is the question whether the agreement signed with Panama is a good deal for the United States; striking bargains with other nations is the prerogative of the President. The only issues presented here are whether the President was acting within the scope of his authority when he signed the Implementation Agreement and, if so, whether the agreement means what it says. For the reasons discussed above, both questions must be answered in the affirmative.

Plaintiff's motion for summary judgment is granted. Defendant's motion for summary judgment is denied.

The clerk is directed to file a copy of this opinion in each of the cases that has been suspended pending final resolution of this case.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PAUL H. & PATRICIA COPLIN,
Appellees,
v. **No. 85-504 Your No. 517-81T**
THE UNITED STATES,
Appellant.

ROBERT E. O'CONNOR, *et ux.*
GLA[illegible]E. O'CONNOR,
Appellees,
v. **No. 85-505 Your No. 265-84T**
THE UNITED STATES,
Appellant.

JON D. COFFIN,
Appellee,
v. **No. 85-506 Your No. 223-83T**
THE UNITED STATES,
Appellant.

JACK R. & MARIA R. MATTOX,
Appellees,
v. **No. 85-507 Your No. 717-83T**
THE UNITED STATES,
Appellant.

JUDGMENT

ON APPEAL from the United States Claims Court

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: REVERSED, and direct that summary judgment be granted in favor of the appellant.

DATED May 10, 1985
The Three Appellees Petitions for Rehearing, Denied, July 3, 1985.

ENTERED BY ORDER OF THE COURT
George E. Hutchinson, Clerk

_____
Clerk

ISSUED AS A MANDATE: JUL 12 1985

APPENDIX D

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

AUG. 14, 1985.

No. 84-8424.

RALPH D. HARRIS AND JOAN F. HARRIS,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

On cross motions for summary judgment in action for refund of federal income taxes, the United States District Court for the Southern District of Georgia, Dudley H. Bowen, Jr., J., 585 F.Supp. 862, granted plaintiffs' motion and denied defendant's motion, and defendant appealed. The Court of Appeals, Eugene A. Wright, Circuit Judge, sitting by designation, held that clear language of Panama Canal treaty creates binational tax exemption for Panama Canal Commission employees.

Affirmed.

Appeal from the United States District Court for the Southern District of Georgia.

Before KRAVITCH, CLARK and WRIGHT*, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge

During 1979, Ralph and Joan Harris resided in the territory within the Republic of Panama that formerly constituted the Canal Zone. They worked for and received a salary from the

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*Honorable Eugene A. Wright, U.S. Circuit Judge for the Ninth Circuit sitting by designation.

Panama Canal Commission (PCC). They filed a joint federal income tax return and paid taxes allegedly due. In 1980, the Harrises filed a refund claim for excess taxes of $6,647 paid in 1979. The claim constituted taxes assessed on wages earned from the PCC from October 1 to December 31, 1979. The Internal Revenue Service (IRS) disallowed the claim.

The basis for taxpayers' refund claim is Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty (Agreement). Taxpayers assert it exempts U.S. citizens from taxation of income derived from their PCC employment. The government construes the Agreement as allowing an exemption only from Panamanian taxation.

The Harrises initiated this civil lawsuit in the district court for the Southern District of Georgia, where they then resided. On cross-motions for summary judgment, the court granted the plaintiffs' motion and entered judgment against the government for the amount sought, plus interest. 585 F.Supp. 862 (S.D.Ga.1984). We affirm.

PANAMA CANAL TREATY

Pursuant to Treaty adopted in 1903, the United States constructed the Panama Canal. Isthmian Canal Convention, T.S. No. 431, 33 Stat. 2234 (Nov. 18, 1903). The treaty granted to the United States "the rights, powers and authority . . . which the United States would possess and exercise if it were the sovereign of the territory. . . ." *Id.*, Article III.

On September 7, 1977, the United States and Panama signed a second Panama Canal Treaty, T.I.A.S. No. 10030, which became effective on October 1, 1979. *See* 22 U.S.C. §§ 3601-3871 (West Supp.1985). It restored to Panama territorial sovereignty over the Canal Zone and granted to the U.S. the right to manage, operate and maintain the canal until the year 2000. The PCC is the agency through which the United States manages canal operations. *Id.*, § 3611.

Because sovereignty was being transferred from the U.S. to Panama, it was imperative to define the rights and legal status of PCC employees. Article III, paragraph 9, provides that:

the rights and legal status of the United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

The issue before the court concerns interpretation of paragraph two of Article XV of the Agreement. Article XV, which governs taxation of the PCC, its contractors and subcontractors, and its U.S. citizen employees and their dependents, is quoted in its entirety.

TAXATION

1. By virtue of this Agreement, the Commission, its contractors and subcontractors, are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.

2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees and dependents shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

4. The Coordinating Committee may establish such regulations as may be appropriate for the implementation of this Article.

Historically, U.S. citizens employed by the Canal Zone received favorable tax treatment. Until 1951, income earned by U.S. citizens employed by the Panama Canal Company or the Panama Canal Zone government was totally exempt from

federal income taxation. Beginning in 1951, the income of those persons was taxed by this government at a lower effective tax rate than mainland taxpayers.

MOTIONS TO STRIKE

By motion on October 19, 1984, the appellees moved to strike footnotes 18 and 19 of the government's opening brief alleging lack of foundation, irrelevancy, incompetency and immateriality.[1]

Although the government did not request leave of court to file extra-record materials, it filed a diplomatic note from the Panamanian Government on March 1, 1985. This late filing of extra-record evidence prompted a second motion to strike by appellees. Therein, they challenged the manner in which the diplomatic note was prepared and presented to us.

The government opposed the motions, citing Supreme Court practice in this area of international diplomacy, which calls for supplementing the record with any material that might aid in treaty interpretation.

We shall dispense with the need for a formal order granting the motions.[2] We shall not consider the challenged material and

[1]Footnote 18 of appellant's brief states:

We are informed that the Government of the Republic of Panama has never expressed any difference of opinion with respect to the position taken by the United States with respect to the domestic taxation of United States citizens who are employed by the Commission.

Footnote 19 states:

Significantly, the official Panama Government publication of the texts of the Canal Treaties and related agreements, entitled *Tratados Del Canal de Panama* (1980), indicates that the Republic of Panama shares the United States' view that the exemptions in paragraph 2 of Article XV apply only to Panamanian taxes. The index of that publication (at 313) contains a heading entitled 'IMPUESTOS (Republica de Panama)' (TAXES (Republic of Panama)) and lists thereunder, *inter alia*, 'Exenciones a los empleados ciudadanos de los Estados Unidos y sus dependientes por razon de su trabajo' (Exemptions to the United States citizen employees and their dependents by reason of their work) Ac—III, Art. XV, pars. 2, 3. No mention is made of exemption from United States taxation.

[2]Appellees' request for costs and expenses in bringing their motions is denied.

we reject the government's suggestion that self-serving evidence outside the record, for which additional explanation is required, can be considered by this court.[3] *See United States v. Oakley*, 744 F.2d 1553, 1556 (11th Cir.1984) (per curiam) (appellate court reviewing grant of summary judgment can review only matters presented to the district court); *Mitchell v. Trade Winds Co.*, 289 F.2d 278, 279 (5th Cir.1961) (Labor Dept. files not in evidence before district court rejected on appeal). But *cf. Dickerson v. Alabama*, 667 F.2d 1364, 1367 & n. 5 (11th Cir.) (appellate court has inherent equitable powers to supplement the record to include state court trial transcript in habeas corpus action), *cert. denied*, 459 U.S. 878, 103 S.Ct. 173, 74 L.Ed.2d 142 (1982).

STANDARD OF REVIEW

In reviewing the grant of summary judgment, an appellate court must apply those legal standards that control the district court's determination. *Mercantile Bank & Trust Co., Ltd. v. Fidelity and Deposit Co.*, 750 F.2d 838, 841 (11th Cir.1985); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir.1981). The appellate court may review only matters presented to the trial court. Oakley, 744 F.2d at 1556.

We apply the same rules of treaty interpretation to executive agreements implementing treaty provisions. Clear language controls unless it "'effects a result inconsistent with the intent or expectations of its signatories.'" *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982) (quoting *Maximov v. United States*, 373 U.S. 49, 54, 83 S.Ct. 1054, 1057, 10 L.Ed.2d 184 (1963)). While possessing the force and effect of law, international agreements should be construed more like contracts than statutes. *See Santovincenzo v. Egan*, 284 U.S. 30, 40, 52 S.Ct. 81, 84, 76 L.Ed. 151 (1931) (international agreements are contracts between foreign states).

TAX EXEMPTION ISSUE

The issue before the court is one of first impression in this circuit. Lower courts generally have held for the government

[3]At oral argument, counsel for the government conceded that this case may be decided on the record.

on this issue.[4] Recently, the Federal Circuit reversed the 46-page opinion for the taxpayers by Claims Court Chief Judge Kozinski. *Coplin v. United States*, 761 F.2d 688 (Fed.Cir.1985), *rev'g*, 6 Cl.Ct. 115 (1984). Appellees in the present case are supported by a group of similarly situated taxpayers as amici curiae, some of whom were appellees in the Coplin case.[5]

Our disagreement with the Federal Circuit concerns the admissibility of the diplomatic note submitted to both courts just before oral argument. The Federal Circuit accepted the note. *See Coplin*, 761 F.2d at 691 (denying appellees' motions to strike diplomatic note and cable from U.S. Embassy in Panama). Appellees' petitions for rehearing which attacked the note's reliability were denied.[6]

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[4]*Rego v. United States*, 591 F.Supp. 123 (W.D.Tenn.1984); *Stabler v. United States*, 84-1 U.S.Tax Cas. (CCH) ¶ 9153 (N.D.Tex.1983); *Hollowell v. United States*, 84-1 U.S.Tax Cas. (CCH) ¶ 9142 (M.D.Fla.1983); *Pierpoint v. United States*, 83-2 U.S.Tax Cas. (CCH) ¶ 9647 (D.S.C.1983); *Snider v. United States*, 53 A.F.T.R.2d 349 (W.D.Wash.1983); *Stokes v. United States*, 83-2 U.S.Tax Cas. (CCH) ¶ 9644 (W.D.Wash.1983); *Long v. United States*, No. 83-158 (D.Or. July 22, 1983); *Swearingen v. United States*, 565 F.Supp. 1019 (D.Colo.1983); *Watson v. United States*, 592 F.Supp. 701 (W.D.Wash.1983); *Corliss v. United States*, 567 F.Supp. 162 (W.D.Ark.1983); *Highley v. United States*, 574 F.Supp. 715 (M.D.Tenn.1983); *Vamprine v. Commissioner*, T.C.M. (CCH) 1984-624; *Smith v. Commissioner*, 83 T.C. 702 (1984); *Collins v. Commissioner*, T.C.M. (CCH) 1983-762; *McCain v. Commissioner*, 81 T.C. 918 (1983).

Contra Harris v. United States, 585 F.Supp. 862 (S.D.Ga.1984); *Coplin v. United States*, 6 Cl.Ct. 115 (1984), *rev'd*, 761 F.2d 688 (Fed.Cir.1985).

[5]Taxpayers were represented at oral argument by counsel for the taxpayers in the *Coplin* case. Amici were represented in this appeal by the former General Counsel for the Panama Canal Commission.

[6]Taxpayers noted the suspicious introduction of this evidence due to a recent $40 million gift to the Panamanian government whose administration had changed in October 1984. Taxpayers further attacked the "strangely identical" letters attached to the note from persons who were not active negotiators of the provision in question. Lastly, the appellees in *Coplin* suggested that the note could not be considered as evidence of intent in September 1977. At best, it showed intent as of February 1985.

In *Coplin*, the Claims Court construed paragraph two literally because the United States government presented no statement of the official Panamanian position. See 84-2 U.S.Tax Cas. (CCH) at 85,002. Chief Judge Kozinski suggested that the absence of a diplomatic note hurt the government's position. *Id.* at 85,003 (drawing a negative inference from the government's refusal to produce evidence of Panamanian intent).

For the Federal Circuit, the diplomatic note and letters delivered to the panel the day of oral argument were dispositive. See Additional Views of Judges Bissell and Smith, 761 F.2d at 692. However, the records in *Coplin* and *Harris* are different. We reject the matters that were not presented to the lower court. On our record, the taxpayers must prevail.

a. The Language

The district court placed determinative reliance on the "unmistakably clear" language of paragraph two of Article XV. Judge Bowen wrote, "I read this paragraph as being subject to or needful of no interpretation. It says what it says." 585 F.Supp. at 863. Rejecting the government's legislative history, the court wrote: "It would take a higher intellect than mine to construe confusion where there is so much clarity in the language utilized." *Id.*, unnumbered footnote.

Paragraph two of Article XV speaks in clear and sweeping terms. It provides that U.S. citizen employees of the PCC "*shall be exempt from any taxes*, fees, or other charges on income received as a result of their work for the Commission" (emphasis added). The government concedes that a broad exemption from domestic taxation exists if the language is given its literal effect. It asserts, however, that such an interpretation is achieved only by wrenching the words out of context. We disagree.

In contrast to the all-inclusive language found in paragraph two, paragraph one establishes an exemption for the Commission itself, limited "to payment in the Republic of Panama of all

taxes". Paragraph three, dealing with personal property, gift and inheritance taxes of U.S. citizen employees, contains an identical limitation. It provides that the presence of the property of Americans "within the territory of the Republic of Panama shall not give rise to the exercise of taxing jurisdiction."

The absence of limiting language in paragraph two, in contrast to paragraphs one and three, demonstrates that "exempt from any taxes" meant just that. Paragraph two was not intended to create an exemption only from payment of Panamanian taxes. The presence of the specific limiting language in paragraphs one and three is persuasive evidence that the absence of similar language in paragraph two was intentional.

The government contends, however, that the presence of the limiting language in paragraphs one and three shows that such language also was intended to be used in paragraph two, except that it was omitted by inadvertence or oversight. This assumes that the government was represented by an inexperienced negotiating team whose drafting errors now need rectification. That was not the case. It was represented by a distinguished negotiating team, obviously aware that the Treaty was a foreign policy mission of the highest magnitude.

Reviewing other taxation provisions of the Treaty package, we find specific references to Panamanian taxation. For example, paragraph 9 of Article IX provides that vessels passing through the Canal "shall be exempt from any taxes . . . by the Republic of Panama." Similarly, paragraph 2(e) of Article XI of the Agreement provides that U.S. PCC contractors "shall not be obliged to pay any tax . . . to the Republic of Panama" provided they are taxed in the U.S. at a substantially equivalent rate. As noted by Judge Kozinski in *Coplin*, "This is an agreement drafted by sophisticated parties, obviously capable of using precise language." 6 Cl.Ct. at 127.

The affidavit of Michael Kozak, State Department negotiator, indicates that the operative language of Article XV was taken from the standard Status of Forces Agreement (SOFA) negotiated between the U.S. and foreign countries in which

U.S. armed forces members and employees are stationed. The SOFA language is virtually identical to the language of paragraph two of Article XV in the Agreement before us, except that in the second sentence an explicit reference is made to taxation "as is provided by Panamanian law":

> Members of the Forces or the civilian component, and dependents, shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the United States Forces or for any of the service facilities referred to in Article XI or XVIII of this Agreement. Similarly, *as is provided by Panamanian law,* they shall be exempt from payment of taxes, fees, or other charges on income derived from sources outside of the Republic of Panama.

Article XVI, Agreement in Implementation of Article IV of the Panama Canal Treaty, Sept. 7, 1977, T.I.A.S. No. 10032 (emphasis added). Amici report that an earlier draft, dated June 26, 1977, of the tax exemption language at issue contained the reference to Panamanian law underscored above.[7] Again, deletion of qualifying language must be considered deliberate.

Moreover, tax exemption clauses are well known to the Treasury, Defense, and State Departments from other treaties. Given this depth of experience, we cannot accept the government's position that its negotiating team adopted language that incorrectly expressed the intent of the Treaty signatories.

b. Legislative History and Treaty Negotiations

As previously noted, clear treaty language controls unless it effects a result inconsistent with the intent and expectations of the signatories. *Sumitomo,* 457 U.S. at 180, 102 S.Ct. at 2377. Where language is susceptible to differing interpretations, extraneous materials bearing on the parties' intent should be considered. *Hidalgo County Water Control and Improvement*

[7]At oral argument, counsel for the government suggested that the phrase "as is provided by Panamanian law," was dropped from the second sentence of paragraph two because it was merely "surplusage."

District v. Hedrick, 226 F.2d 1, 8 (5th Cir.1955), *cert. denied,* 350 U.S. 983, 76 S.Ct. 469, 100 L.Ed. 851 (1956); *Corliss v. United States,* 567 F.Supp. 162, 164 (W.D.Ark.1983). Here, we must consider the interests and intentions of both parties to the Treaty "to secure equality and reciprocity between them." *Jordan v. Tashiro,* 278 U.S. 123, 127, 49 S.Ct. 47, 48, 73 L.Ed. 214 (1928).

The district court had before it the affidavit of Dr. Carlos Alfredo Lopez Guevara, Ambassador Extraordinary and Plenipotentiary, who acted as the chief Panamanian negotiator. Guevara stated that the United States proposed the language of paragraph two without explanation, and the Panamanians accepted it without objection. Guevara said further that the language of paragraph two was intended to preclude both the United States and Panama from taxing American employees of the PCC, that it was so read by Panama, and that a contrary interpretation by the United States would be viewed as a material breach of the treaty. At oral argument, counsel for the government characterized Guevara's affidavit as personal statements "out of step" with his government.

Plaintiffs' summary judgment motion was supported also by sworn statements from Juan Antonio Tack, Minister of Foreign Relations and head of the Panamanian negotiating staff between 1970 and 1976; and Demetrio B. Lakas, Panama's then President. Both said clearly that the language at issue created a tax exemption for U.S. citizen PCC employees in both countries. Tack's letter, interpreted from Spanish, stated: "The general spirit of such a provision was that the U.S. citizens working in the canal administration should be granted some type of economic incentive, in addition to their salaries, for obtaining the highest yield in their specialized functions."

In fact, many provisions of the Treaty secured PCC employees' rights and created special inducements for them to remain on the job.[8] Taxpayers' suggestion that a U.S. tax

[8]For example, Article X, paragraph 10(b) creates an affirmative duty on

exemption was intended as part of the package of inducements is not unreasonable.

The only affidavit filed by the government in support of its summary judgment motion was that of Michael Kozak, Deputy Legal Advisor to the State Department. The Kozak affidavit undermines the government's position. Unlike Guevara, Kozak was not privy to the actual negotiations on the tax exemption issue.

Counsel for the government conceded in *Coplin* that the Kozak affidavit "may not be used to divine the purpose of Article XV." 6 Cl.Ct. at 132 n. 16. Several lower courts holding for the government relied on the unimpeached Kozak affidavit. *See, e.g., Stabler v. United States*, 84-1 U.S.Tax Cas. (CCH) ¶ 9153, at 81,185-86 (N.D.Tex.1983); *Pierpoint v. United States*, 83-2 U.S.Tax Cas. (CCH) ¶ 9647, at 88,329 (D.S.C.1983).

The government's reliance on the Senate hearings and Senate Report accompanying the Treaty also is misplaced. In its brief, the government quotes this interchange between Senator Richard Stone and Herbert J. Hansell, Legal Advisor to the State Department, who was testifying before the Senate Foreign Relations Committee:

> Senator STONE: I think it was article XV, section 1 that raised an interesting question. I will read it to you. 'By virtue of this agreement the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees, or other charges on their activities or properties.' Then, in No. 2, referring to U.S. citizen employees and dependents, it says, 'shall be

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the part of the U.S. to seek legislation which provides more liberal retirement benefits. Other provisions of the Agreement that favor PCC employees include: Article XII, Entry and Departure; Article XIII, Services and Installations; Article XIV, Licenses; Article XVI, Import Duties; Article XVIII, Claims; and Article XIX, Criminal Jurisdiction.

> exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payments of taxes, fees, or other charges on income derived from sources outside the Republic of Panama.'
>
> Of course, when that was announced, the press reported the glee of the Zonians that they were now exempt from U.S. income tax. When Senator Glenn asked you, are there any words that you would like to see in the treaty, I was just asking myself, would you like to see the words, United States, in there somewhere?
>
> Mr. HANSELL. I am sorry to be a source of disappointment for the Panamanians, but obviously we are not entering into an agreement between the United States and Panama that would exempt U.S. citizens from U.S. tax. The purpose of this, of course, was to exempt them from Panamanian tax.
>
> * * *
>
> Senator STONE. Wouldn't you think that we could put in the understanding that I suggested to you, the clarification of our interpretation which then, when ratified by the Congress, by the Senate, and deposited, would clarify that in a little more formal way than simple advices, since you don't want to put words back in the treaty through negotiation? Mr. HANSELL. The one comment I would have with respect to that, and this relates to a couple of other points, is that we are dealing now with an internal U.S. matter, not a matter between the United States and Panama. That is, we don't agree with Panama how we are going to tax our citizens. That is obviously an internal matter. I would hope we could find ways of dealing with internal matters other than as understandings.

Panama Canal Treaties: Hearings Before the Committee on Foreign Relations, 95th Cong., 1st Sess. 268 (1977).

Far from supporting the government, the colloquy underscores the significance of the government's failure to clarify

Article XV(2). The Senator was concerned that the tax issue could spawn litigation and suggested clarification through one of several established diplomatic channels. Hansell rejected the suggestion and responded by characterizing it as an "internal matter" which the government would find a way to avoid.

Moreover, Senator Stone's suggestion that the taxation issue be clarified through an exchange of notes or an "understanding" comports with standard diplomatic negotiating practice. The day the Treaty was signed, there was an extensive exchange of notes between the two nations. These notes supplied additional clarification and assurances regarding many of the provisions covered in the Treaty documents. *See, e.g., Exchange of Notes Relating to Post Services*, Sept. 7, 1977, reprinted in S.Exec.Rep. 95-12, 95 Cong., 1st Sess. (1978), at 726. We find no note exchange pertaining to Article XV on taxation despite ample opportunity between September 1977 when the Treaty documents were signed and October 1979 when they became effective.

Nor does Senate Executive Report No. 95-12 provide competent evidence on intent of the parties to the Agreement. The government urges that we give great weight to the meaning ascribed to Article XV(2) by the federal department charged with the Treaty's negotiation and enforcement. It relies on the State Department's section by section analysis included in the Senate Foreign Relations Committee Report for such meaning.

However, in *Coplin*, the government conceded that the section by section analyses were prepared by Michael Kozak and Geraldine Chester, neither of whom were present at any negotiating session during which the substance of Article XV was discussed. The government conceded also that the analyses were prepared after the negotiations had been completed and the Treaty documents had been signed. Coplin, 6 Cl.Ct. at 128. We reject the government's attempt to establish intent through documents it prepared after the fact.[9] *Cf. Consumer Product*

[9]The dearth of evidence of negotiating history before *Coplin* was tried in the Claims Court may explain why lower courts generally have ruled for the government.

Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 118, 100 S.Ct. 2051, 2061, 64 L.Ed.2d 766 (1980) (remarks of a single legislator on the committee are not controlling on legislative history).

Again, many of the lower courts that ruled for the government on this issue relied on the unimpeached Senate Report. *See, e.g., Rego v. United States*, 591 F.Supp. 123, 124 (W.D.Tenn.1984); *Corliss*, 567 F.Supp. at 165-66; *McCain v. Commissioner*, 81 T.C. 918, 928-29 (1983). In sum, the competent affidavits and legislative history before the district court fully support the taxpayers' position that the parties intended a bi-national tax exemption.

c. Other Considerations

The government contends erroneously that unrestricted U.S. taxation of income earned in Panama by Americans would mirror the pre-1977 *status quo*. As previously indicated, American citizen PCC employees historically were either free of U.S. tax (before 1951) or taxed at a reduced level (after 1951). We consider the tax treatment of PCC employees to be a unique situation. Appellees, therefore, are not subject to the fundamental principle of U.S. tax law that the world-wide income of U.S. citizens is subject to taxation by this government regardless of the person's residence or the source of that income. *See Cook v. Tait*, 265 U.S. 47, 56, 44 S.Ct. 444, 445, 68 L.Ed. 895 (1924).[10]

Amici report that in 1974, only 88 Americans residing in Pan-

[10]"Gross income" in Section 61 of the Internal Revenue Code of 1954 does not include income excluded "by any treaty obligation of the United States." 26 U.S.C. § 894(a) (1982). As the Supreme Court recognized in *Weinberger v. Rossi*, 456 U.S. 25, 29, 102 S.Ct. 1510, 1514, 71 L.Ed.2d 715 (1982), "The word 'treaty' has more than one meaning." We are persuaded that the phrase "treaty obligation" in Section 894 is broad enough to include executive agreements that are signed by the President pursuant to constitutional or statutory authority.

ama filed income tax returns. The total income of these Americans averaged about $32,000 and, according to Treasury Department estimates, produced about $600,000 of tax liability. Compared to the significant economic concessions made by this government as part of the Treaty package, the amount of potential tax revenues that would be lost through the exemption at issue may be considered slight.

Moreover, the number of Americans to benefit by a tax exemption is declining. Article III, paragraph 8, of the Treaty provides for "growing participation" of Panamanian nationals at all levels and areas of employment, with the objective of preparing, in an orderly fashion, for the assumption of full responsibility for Panamanian management of the canal in the year 2000.

In conclusion, we find that the clear language of Article XV(2) of the Agreement creates a bi-national tax exemption for PCC employees. The government has failed to produce competent evidence that Panama and the United States "intended to agree on something different from that appearing on the face of" Article XV of the Agreement. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 678, 87 L.Ed. 877 (1943) (Indian treaties). The government must live with the language it drafted.

AFFIRMED.

Nos. 85-558, 85-559 and 85-560

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT E. O'CONNOR AND GLADYS E. O'CONNOR, PETITIONERS

v.

UNITED STATES OF AMERICA

PAUL H. COPLIN AND PATRICIA COPLIN, PETITIONERS

v.

UNITED STATES OF AMERICA

JACK R. MATTOX AND MARIA MATTOX, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court below correctly determined that Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10031, did not exempt the petitioners from United States taxation on the salaries that they received from the Panama Canal Commission.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-558

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v.

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No. 85-559

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 761 F.2d 688. The opinion of the United States Claims Court (Pet. App. 9a-69a) is reported at 6 Cl. Ct. 115.

JURISDICTION

The judgments of the court of appeals were entered on May 10, 1985, and petitions for rehearing were denied on July 3, 1985 (Pet. App. 70a-71a). The petitions for a writ of certiorari were filed on September 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

TREATY AND EXECUTIVE AGREEMENT INVOLVED

Article III, paragraph 9, of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10030, and Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, T.I.A.S. No. 10031, are set forth in App. A, *infra*.

STATEMENT

1. On September 7, 1977, the United States and the Republic of Panama signed the Panama Canal Treaty, which was approved by the Senate and entered into force on October 1, 1979. That treaty restored to Panama territorial sovereignty over the Canal Zone, while granting to the United States the right to manage, operate and maintain the canal until the year 2000 under the auspices of the Panama Canal Commission (Commission), an agency of the United States government (Pet. App. 3a). Article III, paragraph 9, of the treaty provides in pertinent part that "the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date." Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, also signed on September 7, 1977, provides in pertinent part as follows:

Taxation

> 1. By virtue of this Agreement, the Commission, its contractors and subcontractors, are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.
>
> 2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.
>
> 3. United States citizen employees and dependents shall be exempt from taxes, fees, or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

2. Petitioners Robert O'Connor, Paul Coplin and Jack Mattox are United States citizens who were employed by the Commission during the relevant tax years.[1] The wages they received from the Commission

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[1] Gladys E. O'Connor, Patricia Coplin and Maria R. Mattox are parties to these suits because each filed a joint tax return with her husband. Unless otherwise stated, we will refer to Robert O'Connor, Paul Coplin and Jack Mattox as petitioners.

were included in computing their federal income tax for years 1979 (Coplin), 1980 (Mattox) and 1981 (O'Connor and Mattox). Thereafter, petitioners filed claims for refund for the amount of tax paid with respect to income received from the Commission, urging that Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty exempted that income from domestic taxation. The Internal Revenue Service denied each of their claims, and each petitioner filed a suit for refund in the Claims Court (Pet. App. 2a).

The Claims Court rejected the government's argument that Article XV of the Implementation Agreement was not intended to restrict the right of the United States to tax its citizens. The Claims Court also determined that, even though the Executive Branch had consistently interpreted the Agreement as implicating only Panamanian taxes, a broad, literal interpretation of the Implementation Agreement was required because the government presented "*no evidence whatsoever* as to the interpretation given this language by Panama" (Pet. App. 3a, 29a, 61a-66a, 68a-69a (emphasis in original)).

3. On appeal, the Federal Circuit unanimously reversed. Shortly before oral argument in the court of appeals, the Foreign Minister of the Republic of Panama delivered to the United States government a diplomatic note confirming that the Foreign Ministry of Panama agreed with the United States that Article XV of the Implementation Agreement was not intended to affect United States taxation of Commission employees (App. B, *infra*, 4a-9a; Pet. App. 5a). The Federal Circuit denied petitioners' motion to strike the Panamanian government's note and, consistent with decisions of this Court, considered the views of the Panamanian government. The court stated (Pet. App. 6a) that its role in treaty matters was limited "'to giving effect to the intent of the Treaty parties.'" Since the treaty partners agreed that Article XV of the Implementation Agreement did not exempt the salaries paid to the Commission's United States citizen employees from domestic taxation, the trial court's contrary determination was reversed (Pet. App. 6a-7a). In a concurring opinion, three members of the five judge panel concluded (Pet. App. 8a) that "[a] complete reading of the record [before the Claims Court], the treaty and the Implementation Agreement" indicated that Article XV had no bearing on the power of the United States to tax its own citizens and that it was not necessary to consider the note from the Panamanian government to reach that result.

DISCUSSION

The decision below correctly held that Article XV of the Implementation Agreement did not exempt United States citizens from United States taxation on salaries paid by the Commission.

1. The world-wide income of United States citizens is subject to taxation by the United States regardless of the citizen's residence or the source of such income. Section 1, Internal Revenue Code of 1954 (26 U.S.C.); *Cook* v. *Tait*, 265 U.S. 47, 56 (1924). As has long been recognized, exemption from taxation is a matter of legislative grace and must be granted explicitly. *HCSC-Laundry* v. *United States*, 450 U.S. 1, 5 (1981); *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429-430 (1955); *Helvering* v. *Northwest Steel Rolling Mills, Inc.*, 311 U.S. 46,

49 (1940); *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939). There is no merit to petitioners' claim that Article XV constitutes such an express exemption, permitting them to avoid all taxation on the salaries received from the Commission.

As this Court has indicated, the role of a court in interpreting international agreements is "limited to giving effect to the intent of the Treaty parties." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982). See also *In re Ross*, 140 U.S. 453, 475 (1891). In determining that intent, the courts appropriately examine not only the language used in the treaty, but also the context in which the language is used, the history of negotiations underlying the agreement and the proceedings before the Senate. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 180; *Factor* v. *Laubenheimer*, 290 U.S. 276, 294-295 (1933); *Nielsen* v. *Johnson*, 279 U.S. 47, 52 (1929). Indeed, this Court has not confined its search for guides to the intent of the parties to documents presented to lower courts, but has examined records and expressions of intent of a foreign government that were presented to it for the first time. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 184, n.9; *Factor* v. *Laubenheimer*, 290 U.S. at 295 (this Court's order for reargument invited counsel to conduct a further search through available diplomatic records and correspondence); *United States* v. *Reynes*, 50 U.S. (9 How.) 127, 147-148 (1850).

While the ultimate goal of adjudication is to effect the treaty partners' intent, it has long been settled that the construction of an international agreement by the Executive Branch is entitled to great deference by the courts. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 180-184; *Factor* v. *Laubenheimer*, 290 U.S. at 295. It is, after all, the Executive Branch that is charged with conducting foreign affairs. For that reason, deference is the rule even when the treaty partner takes a view different from that taken by the United States. *Factor* v. *Laubenheimer*, 290 U.S. at 298; *Charlton* v. *Kelly*, 229 U.S. 447, 473 (1913); *Whitney* v. *Robertson*, 124 U.S. 190, 194-195 (1888); *United States* v. *A.L. Burbank & Co.*, 525 F.2d 9[illegible]5 (2d Cir. 1975), cert. denied, 426 U.S. 934 (1976). When, however, "the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji America, Inc.* v. *Avagliano*, *supra*, 457 U.S. at 185. In the present case, the United States has consistently maintained that Article XV of the Implementation Agreement does not exempt from United States taxation the salaries paid to the Commission's United States citizens.

2. An examination of the language of Article XV, the history surrounding its negotiations, and the proceedings leading to Senate ratification of the Treaty underlying the Agreement indicates that it was not intended in any way to restrict the right of the United States to tax its citizens working for the Commission. Paragraph 1 of Article XV exempts the Commission, its contractors and subcontractors from Panamanian taxes. Paragraph 3 of Article XV exempts United States citizen employees of the Commission and their dependents from payment of taxes, fees or other charges on gifts, inheritance and personal property found within the Republic of Panama on account of their own or their sponsor's work for the Panama Canal Commission. Paragraph 2 of that article, which is at issue in this case, provides that

"United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission." If there is any doubt that, in context, this refers only to Panamanian tax, that doubt is resolved by the Article's following sentence, which exempts United States citizen employees of the Commission "from payment of taxes, fees or other charges on income derived from sources outside Panama." To read paragraph 2 as petitioners propose would give credence to the argument that even interest earned on United States bank accounts and dividends from domestic corporations are exempt from United States income tax.

Such a result is clearly absurd. Accordingly, even without considering the recent Panamanian diplomatic note, a large majority of courts [2] (and the ma-

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[2] The Tax Court and many district courts have interpreted Article XV, paragraph 2, of the implementing agreement to exempt salaries of United States citizen employees of the Commission from Panamanian income tax, not from United States income tax. *Smith* v. *Commissioner*, 83 T.C. 702 (1984); *McCain* v. *Commissioner*, 81 T.C. 918 (1983); *Bergman* v. *Commissioner*, 50 T.C.M. (CCH) 158 (1985); *Vamprine* v. *Commissioner*, 49 T.C.M. (CCH) 210 (1984), appeal pending, No. 85-4150 (5th Cir.); *Collins* v. *Commissioner*, 47 T.C.M. (CCH) 713 (1983); *Rego* v. *United States*, 591 F. Supp. 123 (W.D. Tenn. 1984); *Stabler* v. *United States*, 84-1 U.S.T.C. para. 9153 (N.D. Tex. Nov. 30, 1983); *Hollowell* v. *United States*, 84-1 U.S.T.C. ¶ 9142 (M.D. Fla. Nov. 21, 1983); *Corliss* v. *United States*, 567 F. Supp. 162 (W.D. Ark. 1983); *Pierpoint* v. *United States*, 83-2 U.S.T.C. ¶ 9647 (S.C. Oct. 3, 1983); *Snider* v. *United States*, 53 A.F.T.R. 2d 349 (W.D. Wash. Sept. 23, 1983); *Stokes* v. *United States*, 83-2 U.S.T.C. ¶ 9644 (W.D. Wash. Aug. 29, 1983). Accord: unreported Western District of Arkansas opinion in *Skrable* v. *United States*, appeal pending No. 85-1743WA (8th Cir.). See also *Billman* v. *Commissioner*, 83 T.C. 534, 541 n.6 (1984). To the contrary, see *Harris* v. *United States*, 585 F. Supp. 862, 863 (N.D. Ga. 1984), aff'd, 768 F.2d 1240 (11th Cir. 1985). In *Swearingen* v. *United States*, 565 F. Supp. 1019 (Colo. 1983), the court held that an executive agreement, which the Implementation Agreement is, exempting United States citizens from taxation was not within the constitutional powers of the President. In addition, the Tax Court has recently held that in the virtually identical provision of Article XVI of the Agreement in Implementation of Article IV of the Panama Canal Treaty, T.I.A.S. 10032, App. A, *infra* 2a-3a, United States citizen employees of the United States Armed Forces stationed in Panama were not exempt from United States taxation. *Rust* v. *Commissioner*, 85 T.C. No. 15 (Aug. 15, 1985).

jority of judges on the Federal Circuit panel) has concluded that Article XV focuses exclusively on Panamanian taxation. As those courts have held, the Article's purpose is to extend protections to United States citizen employees of the Commission from taxation by Panama, not to relieve them of their duty to pay United States taxes. This construction is supported by the negotiating history underlying the Treaty and Agreement, which indicates that Panamanian taxes alone were the subject of discussions between the parties. The Legal Adviser of the State Department testified before the Senate Foreign Relations Committee during its considerations of the Panama Canal Treaty that paragraph 2 of Article XV related only to Panamanian taxation, not to United States taxation. *Panama Canal Treaties Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess., Pt. 1, at 268-269 (1977); App. C, *infra*, 10a-12a. The section-by-section analysis of the Treaty and its implementing agreements prepared by the State Department for the United States Senate likewise stated that the Implementing Agreement provided an exemption only from Panamanian taxation. S. Exec. Rep. 95-12, 95th Cong., 2d Sess. 155

(1978). In the introduction to the section-by-section analysis, the Senate Report (*id.* at 127) stated that the analysis was—

> prepared by members of the treaty negotiating team and have been approved by the offices of the State and Defense Departments directly involved in the negotiations * * *. Accordingly, these comments may be considered as an authoritative source of information with respect to the negotiating background and interpretation of the Treaties.

The documentary evidence also reveals that the person who drafted Article XV was likewise one of the drafters of the section-by-section analysis (I C.A. App. 25-26, 46, 64).

3. The foregoing analysis makes clear that, even in the absence of the recent Panamanian diplomatic note, the judgment of the court of appeals is correct. Upon submission of the Panamanian note the point was made conclusively. Even if, as petitioners contend, the language of Article XV suggests a different result, this Court has established that such language does not control if it " 'effects a result inconsistent with the intent or expectations of its signatories.' " *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 180, quoting *Maximov* v. *United States*, 373 U.S. 49, 54 (1963). Thus, it was entirely correct for the court below to consider the diplomatic note presented to the United States by the Government of the Republic of Panama. Under well-established rules, when both government parties to a bilateral agreement have concurred in its interpretation, it is inappropriate for courts to chart a different course. In discharging its function of treaty interpretation, this Court has consistently turned to authoritative governmental statements, even those made available only late in the

proceedings. *United States* v. *Pink*, 315 U.S. 203, 220-221 (1942). And, once a foreign government presents a statement dealing with matters within its area of sovereign authority, American courts are obligated to accept that statement at face value as "conclusive." *Ibid.*

4. We acknowledge, however, that the decisions of the Federal Circuit conflict with the recent decision of the Eleventh Circuit in *Harris* v. *United States*, 768 F.2d 1240 (1985). In our view, *Harris* fails properly to apply the canons of treaty interpretation set forth by this Court and, in the end, grants an exemption from domestic taxation intended by neither of the treaty partners. Indeed, the Eleventh Circuit's error in disregarding these rules of construction was compounded by its error in refusing to consider the Panamanian diplomatic note because it had not been presented to the lower court. That ruling is directly in conflict not only with the Federal Circuit's contrary ruling in the present cases, but also with the authorities of this Court. *Sumitomo Shoji America, Inc.* v. *Avagliano, supra.*

5. As matters now stand, United States citizens who were and are employees of the Commission are subject to different rules of taxation on their salaries from the Commission depending upon where they reside and upon the court in which their claim is heard. The issues presented here are now pending in cases in the Fifth, Eighth, and Eleventh Circuits. We have been informed by the Chief Counsel of the Internal Revenue Service that a recent survey indicates that 1714 cases involving $32,607,000 in tax are either pending administratively or in litigation. The Chief Counsel further informs us that 2000 United States citizens were employed by the Commis-

sion in 1979, 1665 in 1984 and 1360 in 1985. In addition, there are 3890 cases with $13,283,000 in tax involving the exemption of military personnel from taxation under a virtually identical provision in Article XVI(2) of the Agreement in Implementation of Article IV of the Panama Canal Treaty, App. A., *infra*. Given the undisputed conflict of decisions and the administrative importance of the question, we do not oppose the petitions for a writ of certiorari.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1985

APPENDIX A

Panama Canal Treaty Between the United States of America and Panama, Sept. 7, 1977, T.I.A.S. No. 10030:

ARTICLE III

Canal Operation and Management

* * * * *

9. The use of the areas, waters and installations with respect to which the United States of America is granted rights pursuant to this Article, and the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

* * * * *

Agreement Between the United States of America and Panama in Implementation of Article III of the Panama Canal Treaty, Sept. 7, 1977, T.I.A.S. No. 10031:

ARTICLE XV

Taxation

1. By virtue of this Agreement, the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.

2. United States citizen employees and dependents shall be exempt from any taxes, fees, or

other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees and dependents shall be exempt from taxes, fees, or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

4. The Coordinating Committee may establish such regulations as may be appropriate for the Implementation of this Article.

Agreement Between the United States of America and Panama in Implementation of Article IV of the Panama Canal Treaty, Sept. 7, 1977, T.I.A.S. No. 10032:

ARTICLE XVI

Taxation

(1) By virtue of this Agreement, the United States Forces are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property, including those imposed through contractors or subcontractors.

(2) Members of the Forces or the civilian component, and dependents, shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the United

States Forces or for any of the service facilities referred to in Articles XI or XVIII of this Agreement. Similarly, as is provided by Panamanian law, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

(3) Members of the Forces or the civilian component, and dependents, shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the United States Forces.

(4) The Joint Committee may establish such regulations as may be appropriate for the implementation of this Article.

APPENDIX B

[Note from Government of the Republic of Panama, February 22, 1985]

DEPARTMENT OF STATE
Division of Language Services
(Translation)

LS NO. 115474-A
Emb/JRP
Spanish

[Text of Government of Panama note D.M. No. 34 from Foreign Minister Cardoze to Ambassador Briggs]

Mr. Ambassador:

I have the honor to refer to Article 15(2) of the Agreement in Implementation of Article III and to Article 16(2) of the Agreement in Implementation of Article IV of the Panama Canal Treaty of 1977.

I have consulted with Drs. Romulo Escobar Bethancourt, Aristides Royo, Adolfo Ahumada, and Jaime Arias Calderon, Panamanian negotiators of those agreements, and they have confirmed to me that the provisions referred to above were discussed, negotiated, and drafted exclusively with respect to the tax exemptions that the Republic of Panama would grant to United States-citizen employees of the Panama Canal Commission and their dependents and to members of the United States Armed Forces and the civilian component and their dependents. The aforementioned provisions resulted from negotiations which did not deal with the United States authority to tax the individuals mentioned therein.

The foregoing expresses the scope of the aforementioned provisions and also represents the interpretation of this Ministry.

Accept, Mr. Ambassador, the assurances of my highest consideration and personal esteem.

[s] Fernando Cardoze Fabrega
Minister of Foreign Relations

LS NO. 115474-B

[Text of Foreign Minister Cardoze's identical notes to Panamanian negotiators Adolfo Ahumada, Romulo Escobar Bethancourt, and James A. Arias]

In your capacity as negotiator of the Panama Canal Treaty, I should like to have your opinion on the correct interpretation of Article 15(2) of the Agreement in Implementation of Article III and Article 16(2) of the Agreement in Implementation of Article IV. Especially, there is an interest in determining whether the tax exemptions referred to in the aforementioned provisions, which are granted to United States-citizen employees of the Commission and their dependents and to employees of the United States Armed Forces and the civilian component and their dependents, refer to tax exemptions from both the Republic of Panama and the United States of America.

I avail myself of this opportunity to renew to you the assurances of my distinguished consideration and esteem.

LS No. 115474-C

[Text of Dr. Ahumada's February 21 reply]

Regarding your consultation of February 20, I am happy to confirm that Article 15(2) of the Agreement in Implementation of Article III and Article 16(2) of the Agreement in Implementation of Article IV of the Panama Canal Treaty of 1977 were discussed, negotiated, and drafted exclusively with respect to the tax exemptions that the Republic of Panama would grant to United States-citizen employees of the Commission and their dependents and to members of the United States Armed Forces and the civilian component and their dependents. The aforementioned provisions resulted from negotiations that did not deal with the United States authority to tax the individuals mentioned therein.

Accept, Mr. Minister, my high consideration.

LS No. 115474-D

[Text of Dr. Escobar's February 22 reply]

Regarding your consultation of February 20, I am happy to confirm that Article 15(2) of the Agreement in Implementation of Article III and Article 16(2) of the Agreement in Implementation of Article IV of the Panama Canal Treaty of 1977 were discussed, negotiated, and drafted exclusively with respect to the tax exemptions that the Republic of Panama would grant to United States-citizen employees of the Commission and their dependents and to members of the United States Armed Forces and the civilian component and their dependents. The aforementioned provisions resulted from negotiations that did not deal with the authority of the United States of America to tax the individuals mentioned therein.

Accept, Mr. Minister, my high consideration.

LS No. 115474-E

[Text of Jaime Arias' February 22 reply]

Regarding your consultation of February 21 and based on my participation in the negotiation and drafting of the Agreement in Implementation of Article IV of the Panama Canal Treaty of 1977, I am happy to confirm to you that Article 16(2) of the Agreement, in whose drafting I took part, and, in my opinion, Article 15(2) of the Agreement in Implementation of Article III of the Treaty, were discussed, negotiated, and drafted exclusively with respect to the tax exemptions that the Republic of Panama would grant to United States-citizen employees of the Commission and their dependents and to members of the United States Armed Forces and the civilian component and their dependents. The aforementioned provisions resulted from negotiations which did not deal with the United States authority to tax the individuals mentioned therein.

Accept, Mr. Minister, my high consideration.

CERTIFICATION OF TRANSLATION

I hereby certify that the above translation bearing LS No. 115474A-E was prepared by the Division of Language Services of the Department of State and that it is a correct translation to the best of my knowledge and belief.

Dated: February 27, 1985

Jorge R. Perez
JORGE R. PEREZ
Assistant Chief, Translating Branch

APPENDIX C

Panama Canal Treaties: Hearings before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. Pt. 1, at 268-269 (1977)

EXEMPTION FROM PANAMANIAN TAXES

Senator STONE. Mr. Chairman, I will be brief. We are at the end of the allotted time. This question is addressed to Mr. Hansell. In your statement you refer to exemption from Panamanian taxes. Would you read from the appropriate agreement the appropriate phrase that you refer to in your statement?

Mr. HANSELL. There are several provisions. I am not sure whether they are in the treaties or in the Implementing Agreements. Let me see if I can find these. This is from the Implementing Agreements. Do you have a set of the Implementing Agreements, Senator?

Senator STONE. I just have the treaties. I don't have the agreements.

Mr. HANSELL. Article XV of the agreement in implementation of article III of the Panama Canal Treaty, and we can give you a set of these—

Senator STONE. I think it was article XV, section 1 that raised an interesting question. I will read it to you. "By virtue of this agreement the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees, or other charges on their activities or properties." Then, in No. 2, referring to U.S. citizen employees and dependents, it says, "shall be exempt from any taxes,

fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payments of taxes, fees, or other charges on income derived from sources outside the Republic of Panama."

Of course, when that was announced, the press reported the glee of the Zonians that they were now exempt from U.S. income tax. When Senator Glenn asked you, are there any words that you would like to se in the treaty, I was just asking myself would you like to see the words, United States, in there somewhere?

Mr. HANSELL. I am sorry to be a source of disappointment for the Panamanians, but obviously we are not entering into an agreement between the United States and Panama that would exempt U.S. citizens from U.S. tax. The purpose of this, of course, was to exempt them from Panamanian tax.

Senator STONE. How would you clarify that in words of [illegible]?

Mr. HANSELL. I believe that is actually under way by the authorities in Panama. The Army, I think, is preparing some information for the zone residents on all aspects of this, including the tax aspect.

Senator STONE. Wouldn't you think that we could put in the understanding that I suggested to you, the clarification of our interpretation which then, when ratified by the Congress, by the Senate, and deposited, would clarify that in a little more formal way than simple advices, since you don't want to put words back in the treaty through negotiation?

Mr. HANSELL. The one comment I would have with respect to that, and this relates to a couple

of other points, is that we are dealing now with an internal U.S. matter, not a matter between the United States and Panama. That is, we don't agree with Panama how we are going to tax our citizens. That is obviously an internal matter. I would hope we could find ways of dealing with internal matters other than as understandings.

Senator STONE. You understand that if the Zonians want to try to exert their exemption from U.S. taxes that you will be in for some lawsuits. I just wanted to figure out a way to avoid that.

Mr. HANSELL. That would not be a lawsuit that I would want to undertake on their behalf, but we will find a way to avoid this.

Senator STONE. You would not undertake this on a contingency basis then? That is really not much of a lawsuit. Thank you, gentlemen.

Senator PELL. The committee will recess until 2 o'clock this afternoon.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20072

Nos. 85-558, 85-559 and 85-560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT E. O'CONNOR and GLADYS E. O'CONNOR,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PAUL H. and PATRICIA COPLIN,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent.

JACK R. and MARIA R. MATTOX,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petitions for Writs of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' REPLY TO RESPONDENT'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-558, 85-559 and 85-560

ROBERT E. O'CONNOR AND GLADYS E. O'CONNOR,
Petitioners

v.

UNITED STATES OF AMERICA

PAUL H. COPLIN AND PATRICIA COPLIN,
Petitioners

v.

UNITED STATES OF AMERICA

JACK R. MATTOX AND MARIA MATTOX,
Petitioners

v.

UNITED STATES OF AMERICA

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITIONERS' REPLY TO RESPONDENT'S REPLY BRIEF

Petitioners respectfully respond to the United States' brief filed on December 3, 1985. The Government's Statement of the case is misleading. If the case were as simplistic as the Government suggests, neither the unanimous panel of the Eleventh Circuit (in *Harris*) nor Chief Judge Kozinski of the Claims Court (in *Coplin*) would have reached the results they did. On the other hand, because the Government joined Petitioners in requesting that certiorari be granted, no need is usefully served by responding to the Government's brief point by point.

Respectfully submitted,

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NO. 85-559

in the

Supreme Court

of the

United States

OCTOBER TERM, 1985

PAUL H. COPLIN and
PATRICIA COPLIN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONERS' BRIEF

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60 pp

QUESTIONS PRESENTED

1. Whether the following language of Article XV(2) of the Implementation Agreement to Article III of the Panama Canal Treaty of 1977 is clear and definite in granting a bi-national tax exemption to U.S. citizen employees of the Panama Canal Commission?

> "United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission."

2. Whether the appellate court can rely on an *extra-record* diplomatic note of questionable reliability to reverse a well reasoned forty-six page trial court opinion which found that the above language clearly granted a bi-national income tax exemption to U.S. citizen employees of the Panama Canal Commission?

3. After informing the trial court that Panama's interpretation of the above language was of 'little value' and of 'little relevance' and after refusing to provide the trial court with evidence of Panama's interpretation, can the United States government (a party litigant with a substantial financial interest in the outcome of the litigation) subsequently submit *extra record* materials of questionable reliability at the appellate level purporting to demonstrate Panama's interpretation of the above language?

4. Was it improper for the appellate court to take judicial notice of those *extra record* materials filed by the United States just one day before oral argument without notice and without giving the taxpayer an opportunity to rebut those *extra record* materials?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit as reported in *Coplin v. United States*, 761 F.2d 688 (Fed. Cir. 1985), *rev'g*, 6 Cl.Ct. 115 (1984), appears in the Petitioners' Appendix filed in a separately bound volume at pages 1a-8a. The opinion of the United States Claims Court as reported in *Coplin v. United States*, 6 Cl.Ct. 115 (1984), also appears in the Petitioners' Appendix (hereinafter "Pet.App.") at pages 9a-69a. In light of the conflict nature of the Writ of Certiorari granted in this case, the opinion of the United States Court of Appeals for the Eleventh Circuit as reported in *Harris v. United States*, 768 F.2d 1240 (11th Cir. 1985) is also reproduced in Petitioners' Appendix at pages 72a-86a. Other Petitioners whose cases in the Federal Circuit were consolidated on appeal with the *Coplin* cases have joined in the preparation and submission of the Petitioners' Appendix, specifically, *O'Connor v. United States*, No. 85-558, and *Mattox v. United States*, No. 85-560.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on May 10, 1985. A timely filed petition for rehearing was denied on July 3, 1985, whereupon a petition for certiorari was filed on September 30, 1985, which was granted on January 13, 1986. An enlargement of time within which to file opening briefs was granted up to and including March 22, 1986. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, TREATY PROVISIONS AND STATUTES INVOLVED

Panama Canal Treaty Between the United States of America and Panama, September 7, 1977, 33 U.S.T. _____, T.I.A.S. No. 10029, Article III, Par. 9 (Hereinafter "Treaty"):

> The rights and legal status of the United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

Agreement Between the United States of America and Panama in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, 33 U.S.T. _____, T.I.A.S. No. 10030, Article XV, Par. 2 (Hereinafter "Implementation Agreement"):

> 2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

U.S. CONST. amend. V (Due Process Clause):

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *

F.R.A.P. Rules 10(a) and 30(a), 28 U.S.C.A.

Rule 10(a):

> * * * The original papers and exhibits filed in the district court * * * shall constitute the record on appeal in all cases.

Rule 30(a):

> * * * The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record * * *

Fed. Rules Evid., Rule 201(b) and 201(e), 28 U.S.C.A.

Rule 201(b) and (e):

(b) Kinds of Facts

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(e) Opportunity to be Heard

> A party is entitled upon timely request to an opportunity to be heard as to the propriety

of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

STATEMENT OF THE CASE

A. Introduction:

Paul Coplin is a U.S. citizen employee of the Panama Canal Commission, and has been since October 1, 1979. He and his dependent wife paid their income tax on all of his wages earned during 1979 which included wages earned by him from his job with the Panama Canal Commission (hereinafter "Commission").

The Panama Canal Treaty of 1977 became effective on October 1, 1979. Article III, paragraph 9, of the Treaty refers to an implementing agreement that, pursuant to the Treaty,[1] governs the rights of employees of the Panama Canal Commission. This case concerns the proper interpretation of Paragraph 2 of Article XV of the Agreement in Implementation to Article III of the Panama Canal Treaty of 1977. It reads:

---

[1]Article XV(2) above is incorporated by reference into the body of the Panama Canal Treaty of 1977 by the following:

> The rights and legal status of the United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

Panama Canal Treaty Between the United States of America and Panama, September 7, 1977, 33 U.S.T. _____, T.I.A.S. No. 10029, Article III, Par. 9 (Hereinafter "Treaty").

> 2. United States citizen employees and dependents shall be exempt from *any taxes*, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama. (Emphasis added).

Agreement Between the United States of America and Panama in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, 33 U.S.T. _____, T.I.A.S. No. 10030, Article XV, Par. 2 (Hereinafter "Implementation Agreement").

The Coplins, and many other Commission employees, claim that the language of Article XV speaks for itself and grants an unequivocal exemption from United States income tax. The United States Claims Court agreed with them. It granted the taxpayers' motion for summary judgment. The Claims Court said, in a 46 page opinion that exhaustively delved into the record, that the Coplins' 1979 Commission wages were exempt from U.S. income taxation based on the clear and unambiguous language of Article XV. *Coplin v. United States*, 6 Cl.Ct. 115, (1984), (Pet. App. 9a-69a).[2]

---

[2]For reference purposes, Petitioners' Appendix filed concurrently with the Petitions for Certiorari is designated as "Pet.App."; references to the United States' appendices attached to its brief in response to the Petitions for Certiorari are designated as "Res.App. A, B, or C"; references to the joint two volume appendix filed in this case from the Federal Circuit are designated as "App.". References to transcripts of proceedings in the Claims Court are designated by a "T." and are further identified by date.

The Government appealed. The Federal Circuit, in an almost cavalier fashion, summarily reversed the Claims Court decision in a four page opinion. It ignored the clear language and based its opinion on suspicious "evidence" which was not part of the record on appeal. *Coplin v. U.S.*, 761 F.2d 688 (Fed. Cir. 1985). This "evidence" was suspiciously acquired from a new Panamanian administration on the heels of an unprecedented 30 million dollar gift given that administration by the United States.

In a recent case, *Harris v. United States*, 768 F.2d 1240 (11th Cir., 1985) *aff'ming* 585 F.Supp 862 (S.D.Ga. 1984), the circuit court rejected the very same "evidence" that the Federal Circuit accepted, concluding:

> "The government has failed to produce competent evidence that Panama and the United States 'intended to agree on something different from that appearing on the face of' Article XV of the Agreement. * * * (Citations omitted) * * * The government must live with the language it drafted. AFFIRMED."

Because of this conflict in the circuits, the Coplins petitioned the Supreme Court for a writ of certiorari to the Federal Circuit.

B. The Negotiations And Taxation As An Issue:

1. *The Issue: Taxation As A Symbol of Sovereignty.*

The issue of taxation as it related to the broader issue of sovereignty played a more significant role in the treaty negotiations than the government would have the Claims Court and the Federal Circuit Court of

Appeals believe. The Claims Court noted the complexity of the taxation issue as it related to sovereignty in the transcripts of the negotiations and pointed it out in its opinion:

> **"The record presented—sketchy though it be—paints a far more complex picture of what happened at the negotiating table than defendant's argument would suggest. It is clear that the United States and Panama held widely divergent views on the subject of taxation of Commission employees." *Coplin*, 6 Cl.Ct. at 129 (Pet. App., 29a).**

* * * *

"Defendant appears to overlook the fundamental issue in these negotiations when it argues that Article XV was not intended to shield Commission employees from U.S. taxation because that possibility was not expressly raised during the negotiating sessions for which we have a record. Equally naive is its assertion that Panama could have no interest in whether the U.S. taxes its citizens who live and work on Panamanian soil and operate the canal in which it has such a significant interest. Defendant's error lies in characterizing the negotiations as turning exclusively on fiscal issues, whereas the record indicates that the controversy was primarily a political one." 6 Cl.Ct. at 132, (Pet. App., 36a-37a).

* * * *

The dispute centered largely on a fundamental disagreement as to the nature and status of the Panama Canal Commission." *Coplin*, 6 Cl.Ct. at 129 (Pet. App., 29a).

* * * *

Panama perceived the operations of the Panama Canal Commission as a commercial enterprise. Panama analogized the operation to a government controlled monopoly: somewhat like the Swedish owned company of Volvo (App., 146). It reasoned that a commercial enterprise should be subject to the sovereign taxing jurisdiction where it carried out its operations. *Id.* at 129-130, (Pet. App., 30a-32a).

Panama viewed the power to tax as a symbol of sovereignty which the United States was well aware of. The July 8, 1977, U.S. internal position paper states:

> "Panama may be raising this as an issue to assert its 'sovereign right' to tax persons resident within its jurisdiction. The money involved is not important to the [Government of Panama], but the principle is." (App., 130).

2. *The Dilemma: Getting a Treaty Signed and Ratified.*

The U.S. negotiating team was caught in a dilemma. The deadline for winding up the treaty negotiations was rapidly approaching and ". . . there was growing pressure to bring the process to a successful conclusion. *See, e.g.*, N.Y. Times, Aug. 2, 1977, at A1, col. 5; Wash. Post, July 30, 1977, at A2, col. 3; N.Y. Times, July 30,

1977, at A1, col. 3." 6 Cl.Ct. at 134, (Pet.App., at 39a), yet thorny problems still existed in obtaining Panama's agreement.

Of these remaining problems, the taxation issue was still unresolved. Panama wanted to erase all vestiges of past American sovereignty in the Canal Zone but the State Department knew that treaty opponents in the Senate would kill the treaty if the United States agreed to allow Panama the right to tax the U.S. citizen employees of the Commission. A staff memorandum from the Treasury Department dated June 29, 1977, reads in pertinent part:

> "To rebate to the Government of Panama Federal income tax payments by U.S. taxpayers residing in the Canal Zone would raise an objectionable precedent in the use of tax policy and has practical problems as well. (App., 159) * * * * *(4) There is a history of strong Congressional opposition to foregoing U.S. tax for the benefit of a foreign country. Investment incentives in tax treaties have been consistently rejected. Congress has also resisted treaty provisions authorizing reciprocal assistance in collecting taxes." (App., 160).

As of July 21, 1977, the dilemma still existed, "This would be the type of issue which treaty opponents could use to considerable advantage. — — We believe we should oppose meeting Panama's demands on this question." Correspondence from Ambassadors Linowitz and Bunker to the Secretary of State (App., 162). *See also*, the August, 1977, State Department telegram showing this issue being still unresolved, App., 99.

Alternatively, the State Department knew that Panama might not sign the treaty if too many restrictions were placed on Panama's regaining sovereignty over the territory and the persons who worked there. An excerpt from the July 14, 1977, negotiating session highlights the controversy:

> **[Mr. Rodrigo] Gonzales [of Panama]:** . . . [I]f the National Bank of Panama, an agency of the government, established a branch in the US, its Panamanian employees would be liable to pay American income tax. The same thing applies to foreign workers in Panama. . . . Another example is Volvo, a government-owned company, which has set up assembly plants in the US. Both its American and Swedish workers pay US income tax.
>
> **[Ambassador Ellsworth] Bunker [of the United States]:** US government employees do not pay income tax anywhere in the world.
>
> **[Minister Aristides] Royo [of Panama]:** We must recognize the changing situation, that this Zone will no longer be a place where American workers are subjected to US jurisdiction, laws, police and courts. The situation now will be one in which American workers, although employed by the American government, will be subjected to a foreign jurisdiction, police, as the colonial status will cease to exist.
> *Coplin*, 6 Cl.Ct. at 130, (Pet.App. at 32a, App. at 146-147).

The use of the term "colonial status" illustrates that the Panamanians were becoming emotionally charged

on the subject of sovereign rights. Negotiating views became more divergent as the positions became deadlocked. As can be seen, the State Department had a tough problem on its hands. The first problem was getting Panama to agree. The other problem was to get the Senate to approve it.

3. *The Solution: Have Your Cake and Eat It Too.*

It is clear that at first, the U.S. negotiating team expected little problem in obtaining its objectives on the taxation issue. A declassified portion of a U.S. internally prepared outline dated May 3, 1977, illustrates this and states:

* * * *

Exemptions from Panamanian taxation

—The US employees need exemption from the following types of Panamanian taxation:

—all taxes, fees or other charges on income received as a result of their work for the United States in Panama. Similarly, as is provided by Panamanian law, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside Panama.

* * * *

—Panama should agree to provide these exemptions:

—in recognition that:

—this procedure is commonly accepted by all host countries in which US Government employees are working;

—to do otherwise would subject these employees to double taxation; and

—taxing these people in the ways mentioned would, in effect, be taxing the US Government, in derogation of our sovereignty. (App., 102)

* * * *

On June 26, 1977, the United States had prepared a draft of the (App., 74) Article XV language. This June 26, 1977, draft contained words in the second sentence which were words of limitation. It reads:

* * * *

United States citizen civilian employees, and dependents, shall be exempt from any taxes, fees, or other charges on income received as a result of the work for the Canal Administration. Similarly, *as is provided by Panamanian law* they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama. . . " (Emphasis added).

The June 26, 1977, draft (or any other draft for that matter) was not presented to the Panamanian delegation at any of the negotiating sessions. Instead

of proposing draft language to the Panamanian delegation which the U.S. team knew would be objectionable at the June 30, 1977, session, Ambassador Linowitz informed the Panamanians that the thought of no Panamanian tax exemption was being "strongly resisted" by the U.S., (App., 115). However, he further stated, "But in fairness to you, we think we ought to probe it further." *Id.*

At the July 11, 1977, session Panama's insistence on taxing the U.S. citizen employees of the Commission did not abate (App., 119-127). It seemed that the more the negotiators talked about the problem, the wider their differences grew. The Claims Court noted:

* * * *

"As the negotiations progressed, the positions of the parties hardened and their differences grew wider rather than narrower. As Ambassador Linowitz noted at the July 11, 1977, negotiating session, '. . . these problems have been even intensified in our further discussions. . .' " 6 Cl.Ct. at 131, (Pet.App., 34a)

* * * *

The July 12, 1977, negotiating session (App. 134-141) became more animated rather than conciliatory and no headway was made. The July 14, 1977, (App. 142-147) session became so animated that the parties were frozen in their positions and literally nothing was said about the income tax at the next meeting on July 18, 1977, (App. 156-158). The parties were deadlocked and the negotiations were at a standstill. It is here that the

transcripts of the negotiations abruptly cease. The only evidence that exists as to what happened next comes from the affidavit of Dr. Carlos Lopez-Guevara, Panama's Ambassador Extraordinary and Plenipotentiary for Canal Treaty Negotiations. He was physically present when the Article XV language was first presented to the Panamanian delegation. He says:

> "5.—During the last negotiation session held in Panama, in August of 1977, the U.S. Delegation *proposed* the text of what is now Section XV, Paragraph 2 of the Agreement in Implementation of the Panama Canal Treaty of 1977, which reads thus: * * * This text was tabled without explanation and no objection was raised by the Panamanian Delegation. Therefore, it was agreed." (Emphasis added).

* * * *

> "7. * * * The wording of the above transcribed agreement is crystal clear. It compels both Panama and the United States of America not to tax United States citizens by reason of their work with the Panama Canal Commission." * * * (App., ppgs. 192-193).

The text that Dr. Guevara refers to above did not have the words "as is provided by Panamanian law," to limit its application as distinguished from the previous draft, *supra*. At those sessions where transcripts were prepared, it is clear that Panama was never shown any of the four "rough drafts" prepared by the Department of State. (App., 26, #2, Defendant's response to Plaintiff's interrogatory #2). Dr. Guevara's affidavit affirmatively

shows that the Article XV language was only presented to the Panamanian delegation at the final negotiating session in August of 1977. It is clear from other portions of the record that the Panamanian position had not changed. They still wanted to tax the U.S. citizen employees. (App., 99; App., 103-105—speech outline dated 8/7/77).

Chief Judge Kozinski concluded that the State Department submitted the language as a compromise. Neither country would tax the U.S. citizens. This was a realistic political compromise that the United States felt compelled to enter into because of the time constraints on the Treaty.

Panama signed the Treaty and Agreements on September 7, 1977. Within two weeks of the signing, a Treasury Department memo from Marcia Field went to a Mr. Goodman recommending that the language of Article XV be clarified to limit the exemption to Panamanian taxation only. (App. 59). Trapped by its own language, the State Department was forced to consider other alternatives than seeking clarification from Panama.

The Panamanian Plebiscite approved the Agreements in October of 1977, and the Agreements were submitted to the Senate Foreign Relations Committee for its recommendations. On October 25, 1977, in a recently disclosed memorandum obtained from the Treasury Department through a Freedom of Information Act request (attached as an appendix at pg. A1),[3] the State Department was put on notice that

[3]Taxpayers request the Court to take judicial notice of this October 25, 1977, memorandum in as much as the Government should have produced it pursuant to a March 23, 1982, request for production.

it would need more than mere legislative history to override the clear language of Article XV if the implementing agreement had the status of a treaty. That letter from Charles I. Kingson to Arthur J. Schissel states in pertinent part:

* * * *

> "1. Paragraph 2 of Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty ("Agreement") dealing with the taxation of United States citizens is unclear. This causes little problem as long as the legislative history clearly reflects that this provision refers only to an exemption from Panamanian taxes and the Agreement is an executive agreement which does not change existing United States tax law. However, if this Agreement is subject to the advice and consent of the Senate, we do not know whether it will have the status of a treaty, which probably overrides existing tax law. *If so, more than legislative history may be necessary to assure that the tax exemption in Article XV applies only to Panamanian taxes.*" (Emphasis added).

* * * *

During this same time frame, Mr. Hansell of the State Department and Attorney General Bell were both testifying to the Senate Foreign Relations Committee that the implementing agreement was an integral part of the treaty and would derive its authority from both the Constitution and the Treaty. *See Panama Canal Treaties, Hearings before the Committee on Foreign*

Relations, United States Senate, Executive N, 95th Cong., (1st Sess.) Part I, pg. 235. *See similarly*, letter from Senator Baker to the State Department, *id.*, at pg. 328 and responses from the Justice Department, *id.*, at pg. 331 and the State Department, *id.*, at pg. 334. (See fn. 1, *supra.* on pg. 4)

As a first step, the State Department prepared the "Section by Section Analyses" of the Agreement that it has relied upon so heavily in the past, as part of the legislative history. However, Senator Stone of the Senate Foreign Relations Committee did not find that to be sufficient. He suggested that the matter be clarified formally with the Republic of Panama by means of an 'understanding' appended to the instruments of ratification. *See Panama Canal Treaties: Hearings before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess., Pt. 1, at 268-269 (1977), (Res. App. C, ppgs. 10a-12a). *Compare, Harris v. United States*, 768 F.2d 1240 (11th Cir. 1985) (a discussion of the colloquy between the State Department and the Senate appears on Pet.App., ppgs. 82a-84a).

The State Department rejected Senator Stone's suggestion. Instead, the State Department promised to find 'a way to avoid' the lawsuits predicted by Senator Stone. The fact that no clarification resulted speaks for itself.

The absence of any evidence to the contrary shows that Panama did not know that the U.S. Department of State was attempting to unilaterally subvert the clear meaning of Article XV. The facts indicate a deliberate attempt to mislead the Senate because the language was prepared months before it was first proposed to the Panamanian delegation, and even then, tabled without

any explanation. The lack of other competent evidence infers that Panama would not have receded from its negotiating position but for the clear language. (T., 2/23/84, 9-10).

Finally, the U.S. Senate gave its advice and consent to the Treaty and the exemption language without any reservation or understanding relevant thereto, and the instruments of ratification were duly exchanged in June of 1978. Thus, both the United States and the Republic of Panama were agreed upon the language if not the meaning of the Treaty and its Agreement. The Coplins and many others rely on the language and its meaning.

The Government suggests that this case is no different from other cases which have decided the same arguments. This case is different because the Court's attention is directed to a reliable source of contemporaneous Panamanian intent evidenced by the negotiating transcripts and the circumstances leading to the signatories' approval of the tax exemption language.

The Claims Court summed up the situation succinctly at the March 8th, 1984, hearing when it said:

> "* * * I feel strongly that the United States did a bad thing here, that it was, at the very least, insensitive and negligent and perhaps more, perhaps more. I don't know what went on. I am puzzled by the opaqueness of the answers given to some of the questions during the ratification process by the fact that there are no notes, nothing about what went on in those Panama meetings, and by the fact that whenever a suggestion is made that a

> clarification be obtained, that it is sh[r]ugged off. * * *" (T. 3/8/84, 54).

C. The Proceedings Below:

1. *Satisfaction of the Jurisdictional Prerequisites:*

After 1979, the Coplins filed their tax return and then filed a timely claim for refund on a form 1040X for $3,759.00 (I-A, 38-39) pertaining to Mr. Coplin's wages from the Panama Canal Commission for the last quarter of 1979. The basis of the refund claim was that the wages earned from the Commission by a U.S. citizen are tax exempt under Article XV(2) of the Implementing Agreement to Article III of the Panama Canal Treaty of 1977.

In conjunction with this, the Coplins claimed that their exemption was authorized by statute, to wit: 26 U.S.C. Sec. 894:

> Income of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation under this subtitle. 26 U.S.C. Sec. 894(a)

On November 26, 1980, the Internal Revenue Service denied the administrative claim for refund (App., pg. 40). The Coplins timely filed a lawsuit for a refund in the Court of Claims in August of 1981. (App., 9-12). The Court of Claims became the United States Claims Court under the Federal Courts Improvement Act of 1982, Pub.L. 97-164, Apr. 2, 1982, 96 Stat. 25. The Claims Court had jurisdiction to hear the case under 28 U.S.C.

Sec. 1346(a). Such refund suits are authorized under 26 U.S.C. Sec. 7422(f)

2. *Proceedings in the Claims Court:*

The Claims Court held three hearings on cross motions for Summary Judgment, two of which occurred from the Court's desire to have clarification from Panama on what it considered an alarming discrepancy between the interpretation argued by the Government as opposed to what the Implementing Agreement says and what the evidence showed.

During the first hearing (February 23, 1984), after argument on the evidence by counsel, the Court advised the Government that its interpretation was not only unpersuasive (T. 2/23/84, 13-14, 36), but that the evidence and context presented, at the very least, two possible scenarios: either the State Department had done an incredibly poor job of drafting the treaty, or it was misrepresenting Panama's interpretation of the exemption language to the United States Senate. (T. 2/23/84, 20-22, 35-36, 66). The Court focused on the discrepancy between the evidence and the clear treaty language versus the Government's arguments, the State Department's unwillingness to clarify and resolve a recognized problem (T. 2/23/84, 54-59) and the strained interpretation the State Department placed on this otherwise clear language (T. 2/23/84, 22-25, 35-36, 54-59). The Court noted that the Senate, in 1977, had pointed out the need for a clarification from Panama on the tax exemption language. Although the Department of State assured the Senate Foreign Relations Committee that the problem would be resolved, it did nothing. (T. 2/23/84, 18, 54-59). The Court expressed deep concern about the Government's

lack of sensitivity to language which lures individuals into lawsuits against the United States (T. 2/23/84, 19-23, 35, 58-59). The Claims Court carefully scrutinized the colloquy between Senator Stone and the State Department representative, Herbert Hansell, which occurred during the Senate Foreign Relations Committee Hearings in late 1977. The Claims Court tried on numerous occasions to find out what steps the State Department had taken to "avoid" lawsuits such as this, since the promise had been made that a way to avoid this type of lawsuit would be found (T. 2/23/84, 59). Before ruling, in order to insure that the Government had ample opportunity to formally clarify this language, the Court suggested that the Government obtain a clarification from Panama through the State Department which might cast more meaningful weight on the Government's case. (T. 2/23/84, 34-35, 52-59). The Court also requested the Government to get in touch with someone from the State Department to explain the State Department's strange behavior in failing to formally clarify the language by means of an understanding or an alternative method since 1977. (T. 2/23/84, 59, 65-67, 70, 72). The Government indicated that two weeks would be sufficient for it to comply (T. 2/23/84, 72) knowing that failure to do so would be weighed against the Government's case (T. 2/23/84, 35-36, 66).

Two weeks later, on March 8, 1984, in the morning session, the Government represented that it did not believe a clarifying note could be obtained from the State Department regarding the Treaty language or an explanation of the State Department's failure to act (T. 3/8/84, 3). The Government indicated that it did not believe that such evidence was necessary or appropriate and that the United States wanted to rest on the record

(T. 3/8/84, 6, 8, 11-12). The Court, obviously alarmed at what it was hearing (T. 3/8/84, 3-13), reemphasized how important it would be for the Government to take advantage of this opportunity when it came time for the Claims Court to make its decision. (T. 3/8/84, 6-14). The Court suggested to the Government's counsel to bring a superior from the Department of Justice and someone from the State Department (T. 3/8/84, 14) to again insure, before ruling, that the Government was not merely rejecting this opportunity to set the record straight by oversight. Judge Kozinski wanted to make sure that the waiver of this opportunity was consciously made (T. 3/8/84, 9). The Court reiterated the seriousness of the matter and the peril confronting the Government's case (T. 3/8/84, 8, 14-15).

That afternoon the Government's counsel returned with her immediate superior, but with no one from the State Department (T. 3/8/84, 17). At that hearing, the Court reiterated its suggestion to make sure that the Government's opportunity was well understood (T. 3/8/84, 21) and the reasons therefor to the Government's counsel's superior (T. 3/8/84, 18-26) and again gave the Government an opportunity to supplement the record. The Government knowingly waived this and other opportunities to supplement the record (T. 3/8/84, 27-54) and requested that judgment be entered on the record as it stood (T. 3/8/84, 43). Having no alternative but to rule on the record presented, after asking again for more evidence from the Government and the opportunity again being waived (T. 3/8/84, 44), the Court informed the Government that such a failure to bring forth information would also be considered during deliberation (T. 3/8/84, 45). The Court reasoned thus because the Taxpayers had produced significantly more persuasive evidence and

arguments than the Government (T. 3/8/84, 45), when the Government was actually in a better position to acquire more evidence. The record was closed (T. 3/8/84, 50) and the Court entered judgment for Taxpayers from the bench.

In June the Court ordered all discovery to be supplemented and appended to the record without objection. The Court also supplemented the record with a letter from the Panama Canal Commission without objection. After almost five months from the March 8th hearing, the Court filed its 46 page opinion and judgment in favor of the Taxpayers. *Coplin v. United States*, 6 Cl.Ct. 115 (1984).

3. *The Proceedings in the Federal Circuit:*

The Government timely appealed the decision and filed its opening Appellate brief on November 30, 1984. The Federal Circuit had jurisdiction under 28 U.S.C. Sec. 1295(a)(3).

In its brief, the Government reiterated its belief expressed in the Claims Court that "the Panamanian interpretation would be of little relevance," and that "consulting the Panamanian Government in this case would have been of little value." (See Br. for Appellant, Fed. Cir., 11/30/84, ppgs. 46 and fn. 23 on pg. 47). The basis of its argument on appeal was that only its unilateral interpretation of treaty language was controlling, regardless of the clear language.

In October, 1984, a new administration came into power in Panama. On December 24, 1984, the United States gave the Republic of Panama 30 million dollars

which the United States Ambassador characterized as "unprecedented" in either country's history. (See Appellees joint Motion to Strike, Fed. Cir., 3/4/85).

In February, 1985, the government, who previously insisted that such evidence was of "little value", suddenly received a telegram from the Minister of Foreign Affairs of Panama with letters from three former Panamanian treaty negotiators who were not involved in any negotiations of Article XV(2) of the Implementation Agreement (as discussed *supra.*, at pg. 14-15, there were no negotiations held on the language of Article XV). The translated version of the letters and the accompanying telegram from the then Panamanian Minister of Foreign Affairs purport to indicate that now, the Republic of Panama does not think the treaty means what it says either. Actually, the letters are vague and ambigious and state only that the focus of the negotiations was on Panama's taxing power over the U.S. citizen employees of the Commission. They do not provide a direct interpretation.

On March 1, 1985, just one working day before the appellate oral argument, the government filed its reply brief and attached the cablegrams with translations to it as an 'appendix'. No previous notice was given to Appellees and no other pleading requesting the Court of Appeals to accept such papers was filed by the Government. Additionally, no explanation of how the cablegram was acquired was given to the court by the government.

On March 4, 1985, Taxpayers filed a joint motion to strike the proffered appendix informing the court of the 30 million dollar transaction with the new administration, and prior statements made by the Foreign

Minister during public discussions which were in direct conflict with the substance of the telegrams. The motions also noted the incompetence of the three individuals who had no direct involvement in the negotiation of the provision, and the due process problems that such a submission creates. The only explanation offered by the government for abandoning its prior position was that diplomacy could not be artificially limited by the time frames of litigation. The government misrepresented that it previously did not have sufficient opportunity to acquire the note and submit it during the trial proceedings in the Claims Court. It ignored the repeated waivers it made when the Claims Court requested more information. However, it conceded that the case could be decided solely on the record made in the Claims Court without reference to the suspiciously acquired cablegram. (Appellant's Reply Br., Fed. Cir., pg. 7). It similarly conceded the same thing in a related case then pending before the Eleventh Circuit. *Harris v. United States*, 768 F.2d 1240, *affirming* 585 F.Supp. 862.

The Court of Appeals denied the motions to strike and reversed the Claims Court on May 10, 1985. Taxpayers and two other appellees filed timely Petitions for Rehearing relying on the record made in the Claims Court and the due process problems raised by the government's actions. The three Petitions for Rehearing were denied on July 3, 1985.

4. *Proceedings in the Supreme Court:*

The taxpayers filed a Petition for Writ of Certiorari to the Federal Circuit in the Supreme Court on September 30, 1985, which was granted on January 13, 1986. This brief is due March 22, 1986.

SUMMARY OF THE ARGUMENT

This case is unusual because its focus is not only on the state of mind of the signatories of Article XV in 1977 but also on the positions of the negotiators at that time. The signatories' state of mind is shown by contemporaneous evidence preserved in the form of negotiating transcripts, actions taken at the negotiating table and the lack of adequate explanations for actions which should have been taken, but were not. Of course the best evidence of the signatories' intent is the clear language itself.

In the Statement Of The Case, the negotiating history that is preserved was analyzed from the perspective that a deadlock in the negotiations existed. However, even the most preserved history cannot record every thought and every nuance. These 'gaps' must necessarily be filled by inferences evidenced by the signatories' public actions in the course of concluding the treaty.

In this case, the United States and Panamanian negotiations were at a standstill. Panama perceived it as an issue of sovereignty. The United States was seeking a new Panama Canal Treaty. Out of the deadlock resulted language which, on its face, unambiguously exempts U.S. citizen employees of the Commission from both U.S. taxation and Panamanian taxation. This language was drafted and significantly amended several times by the United States before it was ever proposed to Panama. When it was proposed to Panama at the final negotiating session, the United States offered no explanation for it and Panama accepted it without objection.

Although the United States was informed by its own tax advisors that this language needed to be clarified in a restrictive sense on at least two different occasions, the Government did nothing. Before the Senate Foreign Relations Committee, formal clarification was again suggested. Instead of welcoming the chance to clarify the language pursuant to its own policy, the Government rejected all opportunities.

Even after litigation arose, and the opportunity presented itself time and time again, the Government still rejected all opportunities to formally clarify the language. Only after losing an important case in the Claims Court does the Government mysteriously acquire a cablegram from its Treaty partner, which was obtained under the most unusual of circumstances. A large gift of money was exchanged shortly before the cablegram arrived. The Government then submited it into two different Appellate courts instead of a trial court. As explanation for such an untimely action, the Government explained that no opportunity was given in the trial court for such a submission. This was false.

The Federal Circuit accepted the cablegram but the Eleventh Circuit rejected it. The taxpayers submit that the Federal Circuit abused its discretion in judicially noticing such materials that are introduced under such unusual and suspicious circumstances. Such an abuse deprived the Taxpayers of a fair trial.

Taxpayers submit that the Government's actions in this scenario have not been straightforward with Panama, Congress, the courts or the affected taxpayers. Its actions deserve close scrutiny to avoid a violation of the treaty it wrote. In the words of J. Eugene Wright,

sitting by designation in the Eleventh Circuit: "We shall not consider the challenged material and we reject the government's suggestion that self-serving evidence outside the record, for which additional explanation is required, can be considered by this court * * * The government must live with the language it drafted." *Harris v. U.S.*, 768 F.2d 1240, (11th Cir.1985).

I. THE FEDERAL CIRCUIT ABUSED ITS DISCRETION BY RELYING ON SUSPECT EVIDENCE TO REVERSE A THOROUGHLY CONSIDERED JUDGMENT AND BY JUDICIALLY REWRITING THE TREATY PROVISION WITHOUT REFERENCE TO SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO OVERTURN THE CLAIMS COURT.

A. Introduction.

> "A treaty is a contract between or among sovereign nations. See *Washington v. Fishing Vessel Assn.*, 433 U.S. 658, 675, 99 S.Ct. 3055, 3069, 61 L.Ed.2d 823 (1979). General rules of construction apply to international agreements. See *Ware v. Hylton*, 3 Dall. 199, 240-241, 1 L.Ed. 568 (1796) (opinion of Chase, J.). As with any written document, there "is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation but perversion * * * *" *The Five Per Cent. Discount Cases*, 243 U.S. 97, 106, 37 S.Ct. 346, 347, 61 L.Ed. 617 (1917). International agreements, like "other contracts, * * * are to be read in the light of

> the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting," *Rocca v. Thompson*, 223 U.S. 317, 331-332, 32 S.Ct. 207, 210-211, 56 L.Ed. 453 (1912)' see also *Factor v. Laubenheimer*, 290 U.S. 276, 295, 54 S.Ct. 191, 196, 78 L.Ed. 315 (1933), and should be interpreted according to the "received acceptation of the terms in which they are expressed." *United States v. D'Auterive*, 51 U.S. (10 How.) 609, 623, 13 L.Ed. 560 (1850)."

as quoted from Trans World Airlines, Inc. v. Franklin Mint Corp., ____ U.S. ____, 104 S.Ct. 1776, 1788 (dis.op. Stevens J.) (1984).

The Claims Court made a careful and exhaustive review of the record and ruled according to how it perceived the intent of the parties to be in 1977. It said:

> "Indeed, a fair reading of the language in question leads to the conclusion that it unambiguously exempts U.S. citizens who are Commission employees from taxation by Panama as well as the United States. *Accord Harris v. United States*, [585 F.Supp. 862]; *Swearingen*, F.Supp. at 1020." *Coplin*, 6 Cl.Ct. at 127 * * *
>
> " * * * A fair review of the negotiating history of Article XV leads to the conclusion that in all likelihood the language adopted accurately reflects the agreement reached by the parties." *Id.* at 134.

In sharp contrast to this, the Federal Circuit merely decided that the intent of the signatories to the treaty was better evidenced by a suspect diplomatic note obtained in 1985 rather than the negotiating documents created contemporaneously with the treaty in 1977. A concurring opinion made a token reference to the record, but contented itself in its decision by simply reforming the treaty provision. Both conclusions are in error for the reasons discussed below.

B. The Federal Circuit Abused its Discretion In Taking Judicial Notice of Patently Unreliable *Extra Record* Materials. The Federal Circuit Denied Taxpayers a Fair Trial By Reversing the Claims Court Judgment.

In reaching its majority decision, the Federal Circuit took judicial notice of a diplomatic note that was of questionable reliability.

Fed. Rules Evid., Rule 201(b), 28 U.S.C. states:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

1. *The Reliability of the Diplomatic Note Is Questionable Because of the Way In Which It Was Obtained.*

Although the Federal Circuit ignored the Taxpayers' attempts to bring evidence to its attention which casts

doubt upon the credibility of the diplomatic note, the evidence still exists. The majority of the evidence is already part of the record in the Claims Court and consists of the negotiating history and the proceedings before the Senate Foreign Relations Committee. Additional evidence was submitted attached to the Taxpayers' motions to strike, dated March 4, 1985.

First, the copies of the cabled note and the three attachments are suspicious on their face. The three attachments allegedly signed by the Panamanian negotiators are identical in substantive wording (Res. App. 7a-9a): as if someone else prepared boilerplate letters for the Panamanians to sign. Significantly, no formal diplomatic note with signed authenticated letters has been filed in court. Petitioners have only seen copies of a cablegram. Additionally, the State Department gives no explanation as to how or what motivated their acquisition. The logical inference is that the instant litigation is responsible for the creation of these materials.

None of the three Panamanians who supposedly wrote these interpretative attachments, had anything whatsoever to do with the negotiation of Article XV. The transcripts of the negotiations and the affidavit of Dr. Carlos Lopez Guevara affirmatively show that the language of Article XV was never discussed. Additionally, the attachments do not show their alleged drafters being present when the language was first proposed at the negotiating table, or when the language was accepted by Panama. The attachments are not sworn.

Transcripts of statements made by Fernando Cardoze in 1984, while he was Panama's representative on the board of directors of the Panama Canal Commission,

are directly contradictory with the conclusions of his note. These transcripts were also introduced, but ignored by the Federal Circuit. See Appellees' Motions to Strike, March 4, 1985.

In addition to this, the circumstances surrounding the acquisition of the note casts considerable doubt upon its credibility. The note was created on the heels of a 30 million dollar gift to a new pro-American (The Miami Herald, Jan. 17, 1986, A16, Col. 1) Panamanian adminstration that had been in power for only two months. Even our own Ambassador in Panama labeled the gift 'unprecedented'. Although our government's political right to make such gifts cannot be challenged, their existence is certainly relevant as probative evidence going to the weight of the note's credibility. However, such evidence was also ignored by the Federal Circuit.

2. *The Negotiating History Further Erodes the Material's Reliability.*

The negotiating history illustrates the inconsistencies of the State Department's acts with its own established procedures. Specifically, the Government repeatedly failed to draft the Article XV language during the negotiations in a way that would support its present position. (Pet.App. 44a-47a). "Treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties." *Rocca v. Thompson*, 223 U.S. 317, 332, 32 S.Ct. 207, 210, 56 L.Ed. 453 (1912). It is noted that the Government has failed to come up with any reasonable explanation for drafting Article XV in such sweepingly unambiguous terms.

Such clarity cannot be turned inside out by invoking rules of construction. *Bergholm v. Peoria Life Ins.*, 284 U.S. 489, 492, 52 S.Ct. 230, 231, 76 L.Ed. 416 (1932); *National Surety v. McGreevy*, 64 F.2d 899 (8th Cir. 1933). The language of the instrument cannot be ignored when construing it. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 181, 102 S.Ct. 2374, 2372, 72 L.Ed2 765 (1982); A.L.I., *Restatement of the Law, Foreign Relations Law of the United States*, Sec. 147(2).

The State Department refused to communicate its intent to restrictively interpret the language to the Panamanians both before, during and after the instrument was signed. It refused to communicate its restrictive interpretation evidenced by the "Section By Section Analyses", that were given to the Senate Foreign Relations Committee, by means of an 'understanding' even though the opportunity was presented by Senator Stone. *See Harris v. United States*, 768 F.2d at 1245-1246, (Pet.App. 82a-84a). This inconsistent approach towards informing a treaty partner of its intent to restrictively interpret a provision in a treaty is against State Department policy. *See e.g., Power Authority of New York v. Federal Power Commission*, 247 F.2d 538 (D.C.Cir., *vacated as moot sub nom., American Public Power Association v. Power Authority of New York*, 355 U.S. 64, 78 S.Ct. 141, 2 L.Ed.2d 107 (1957). The policy of the State Department has consistently been:

> Even in the case of an "understanding" * * * it is the invariable rule in regard to bilateral treaties to obtain the consent of the other country before ratifying the treaty.

U.S. Department of State, *The Law of Treaties as Applied by The Government of the United States of America*, 102 (Mar.31, 1950), *quoted in* Bishop, 103 Receuil des Cours 304.

Such a failure to communicate an interpretation at the conclusion of the treaty process makes that interpretation ineffective. *Fourteen Diamond Rings v. United States*, 183 U.S.176, 179-180, 22 S.Ct. 59, 60-61, 46 L.Ed.138 (1901).

In light of such suspect behavior, it is unreasonable to allow the introduction of such materials in the Appellate proceeding. The actions of the Government violated the spirit of *"uberrima fides"*, that is, that treaties must be entered into with utmost scrupulous good faith. *Tucker v. Alexandroff*, 183 U.S. 424, 437, 22 S.Ct. 195, 200, 46 L.Ed. 264 (1902).

> "There is something * * * which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it."

New York Indians v. United States, 170 U.S. 1, 23, 18 S.Ct. 531, 536, 42 L.Ed. 927 (1897).

3. *In Light of the Questionable Reliability of the Diplomatic Note, The Federal Circuit Abused Its*

Discretion In Denying The Motions To Strike and The Petitions For Rehearing.

When a Court takes judicial notice of any item of evidence, it must give an opportunity to be heard under the rules. Fed. Rules Evid., Rule 201(e), 28 U.S.C. A failure to grant such an opportunity is reversible error, because the failure to give such an opportunity infers that the Federal Circuit considered the note in a vacuum. Facts judicially noticed may be subject to rebuttal. *Government of Virgin Islands v. Gereau*, 523 F2d 140 (3rd Cir. 1975) *cert.den.* 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed.2d 323. *See also, Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 301, 57 S.Ct. 724, 729, 81 L.Ed 1093 (1937). "Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence." *Id.* The effect of taking judicial notice does not preclude the introduction of evidence in rebuttal. Such a preclusion is a denial of due process and is fundamentally unfair.

Rule 44.1 of the Claims Court Rules of Procedure and the identical rule 44.1 of the Fed.R.Civ.Pro., 28 U.S.C., both require reasonable notice from any party intending to raise an issue of foreign law, especially when an invitation to do so in the trial court had been expressly rejected. *See United States v. VETCO*, 691 F.2d 1281 (9th Cir. 1981). *Similarly, Jannenga v. Nationwide Life Insurance Co.*, 288 F.2d 169 (D.C. Cir. 1961).

In denying Taxpayer's motions to strike, and then taking judicial notice of the note, the Federal Circuit eviscerated the Taxpayers' right to a fair trial, Fed. Rules Evid.. 28 U.S.C., Rule 201. The Government

appealed the Claims Court judgment on the basis of insufficient evidence, and then, in a surprising move, introduced *extra record* materials that it had waived introducing at the trial level.

The logical inference is that the instant litigation motivated the acquisition of the diplomatic note. Although the Federal Circuit opted to ignore the competent evidence of intent created contemporaneously with the treaty in 1977, the Eleventh Circuit was not so diverted. *See Harris, supra.*

By denying the petitions for rehearing Taxpayers did not receive an opportunity to present evidence against the note. Some of the evidence that Taxpayers could have brought forth, had the opportunity been afforded, concerned the legality of the note under Panamanian law. Under Article 31 of the Vienna Convention, clear and unambiguous language controls the interpretation of a treaty provision. Interpretations or agreements that change the meaning of clear language must themselves be ratified formally in accord with Article 39 of the Vienna Convention. Article 4 of the Panamanian Constitution of 1972 obliges Panama to follow the Vienna Convention, even though the United States has not ratified it. *See, A.L.I., Restatement of the Law, Foreign Relations Law of the United States (Revised)*, Sec. 325, comment f., Tentative Draft No. 6—Vol.2, Apr. 12, 1985, pg. 100.

As distinguished from American practice, the Vienna Convention mandates a review of secondary sources such as negotiating histories and Senate debates only if the meaning attributed to the plain language of the provision in question is unreasonable. *Id.*

4. *Additional Considerations.*

a. The Government Has Waived Its Rights to Introduce New Evidence of Any Kind.

It was the U.S. government who drafted the language of Article XV. This drafting process included participation by at least two Federal Departments, at least three State Department attorneys, two U.S. ambassadors and miscellaneous other U.S. negotiators. Additionally, the drafting took place over several months and at least four separate drafts have been produced. Each of the drafts contain amendments differentiating one from the other. The government could have amended it to clearly exempt only Panamanian taxes as was done elsewhere in the treaty. Instead, the government deleted language which made the provision even more broad and sweeping (compare the first draft with the last draft). Clearly, the government's characterization of the language being merely the result of a drafting error is false.

When the Senate was conducting hearings, there were at least three notices given to the State Department stressing the need to clarify the exemption language. These notices consist of: the Marcia Field memorandum (App., 58-59); the Treasury Department memorandum from Charles I. Kingson to Arthur J. Schissel reproduced in the appendix attached hereto (See fn. 3 *supra*); and the colloquy between Senator Stone and Herbert Hansell reproduced at Res. App. at ppgs. 10a-12a. A recent Freedom of Information Act request to the Treasury department produced the Kingson/Schissel memorandum. This memo shows that the government was aware that the language agreed upon would need more than

legislative history to keep the exemption from being reciprocal if construed as having the force and effect of a treaty. The State Department, as well as the Attorney General, knew that the Article XV language had the force and effect of the Treaty because they represented as much to the Senate. *See Panama Canal Treaties: Hearings before the Senate Comm. on Foreign Relations*, United States Senate, 95th Cong., (1st Sess.) Pt. 1, at 235, 328, 331, 334, (1977), and fn 1., *supra* at pg. 4.

Taxpayers suggest that it was this memo which motivated the Department of State to prepare the self-serving "Section By Section Analyses" relied upon so heavily by the government. Taxpayers suggest that those same analyses were prepared by the government as an expedient method to gain political support from the Senate for the ultimate ratification of the treaty.

Further evidence of chicanery is apparant in the legislative history. For example, the colloquy between Senator Stone and Herbert Hansell of the Department of State did not evidence the legislative history hoped for by the Department of State. Although Mr. Hansell filled the record with declarations that the taxation issue was merely internal, Senator Stone's persistent inquiry into the matter did not receive direct answers and his challenge, that the United States enter into a formal 'understanding' with Panama, was brushed aside. When Senator Stone warned of lawsuits being filed by "Zonians" to enforce their exemption, Mr. Hansell represented that the Government "would find a way to avoid" such problems. *See Panama Canal Treaties: Hearings before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. Pt. 1, at 268-269 (1977), Res. Br., App. C., ppgs. 10a-12a. *See also, Harris v. United States*, 768 F.2d at 1245-1246.

As it turned out, Mr. Hansell's promise was empty. Mr. Hansell did nothing to clarify this provision to prevent litigation. If Panama was in accord that the exemption language applied only to Panamanian taxation in 1977, the Department of State should have welcomed the vehicle of an 'understanding' to expressly clarify this language.

When the case was called up for summary judgment in February of 1984, the Claims Court again gave many opportunities to the government to get in touch with Panama and solicit its views. Instead of welcoming this reprieve, the government repeatedly refused the opportunities and insisted that the case be decided on the materials then before the court.

After appealing the case and characterizing Panama's interpretation as being of 'little relevance' and of 'little value', the Government deposited with the appellate court a diplomatic cablegram from Panama on the eve of oral argument. The court expressed curiosity as to this unusual late filing. The Government casually explained that the wheels of diplomacy grind slowly and that the Government did not have the opportunity to present such evidence in the Claims Court.

Such arrogance cloaked in a mantle of humility is shocking and can not be tolerated in a court of justice. The government is estopped from introducing any *extra record* material to controvert not only the clear language, but its own stated position as to the relevance of a Panamanian interpretation. To even entertain such knavery makes a mockery of our court system and our concepts of due process.

The judiciary acts as a buffer and bastion against the tides of government arrogance and its effect on individuals. To allow such conduct in the appellate court proceedings or the Supreme Court would simply supplant our system of law with an unbridled system of "might over right". This is a government of law, not men. *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60, 69 (1802). The Federal Circuit's analysis of this case actually condones misconduct by the government.

The government could have, but did not, restrict the application of Article XV(2) to Panamanian taxation only. It is estopped from doing so now through the courts.

For these reasons, Taxpayers submit that the Government has waived any right whatsoever to introduce new evidence of such a suspicious nature into the Appellate proceeding, and the Federal Circuit abused its discretion in accepting the evidence.

b. Judicial Estoppel and the Rules of Appellate Procedure Precluded the Government from Introducing the Note and Precluded the Federal Circuit From Accepting It.

Judicial estoppel operates to prevent a party from insulting a court through improper use of judicial machinery. *Konstantindis v. Chen*, 626 F.2d 933, 938 (1980). The doctrine is similar to an ordinary estoppel but differs in that its policy is to prevent a party " * * * from "playing 'fast and loose,'" *Scarano v. Central R. R.*, 203 F.2d 510, 513 (3d Cir. 1983), or "blow[ing] hot and cold," *Ronson Corp. v. Aktiengesellschaft*, 375 F.Supp. 628, 630 (S.D.N.Y. 1974) with the courts, and is

designed to "protect the integrity of the courts and the judicial process." *United Virginia Bank v. Saul Real Estate*, 641 F.2d 185, 190 (4th Cir. 1981), *quoting from Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1177-1179 (D.S.C.1975)." *Donovan v. United States Postal Service*, 530 F.Supp. 894, 902 (D.D.C.1981).

The criteria applicable for the application of judicial estoppel are: (1) the same facts must be in issue; (2) the judicial body must have relied upon the assertions of the party; (3) the assertions must not have been based on fraud, inadvertence, or mistake. *id.*, at 902. The net effect of the elements must result in an adverse outcome in the prior judicial proceeding, *Konstantinidis v. Chen, supra.* at 938-939.

In the instant case, all the criteria have been met by the Government: (1) Intent of the signatories of Article XV is the factual issue; (2) The Claims Court relied on the Government's representation that no interpretive declaration or note would be sought from Panama; (3) The Claims Court repeatedly verified that the Government knew it had the opportunity to present such evidence but said opportunities were "steadfastly refused". (4) The Claims Court relied upon the waiver in weighing the evidence and making its deliberations against the Government.

Now, in the Appellate stage of the proceedings, the Government takes unprecedented measures and secures a diplomatic note that it refused to even entertain at the trial level, and submits it as 'conclusive' evidence of intent even though its reliablity and legality is vigorously contested by the Taxpayers.

Taxpayers submit that the Government is precluded from introducing such evidence and the Federal Circuit abused its discretion in accepting such materials by the doctrine of Judicial estoppel. In addition, the Government has waived any right to submit such evidence in the appellate court when it knowingly refused the opportunity to do so at the trial level.

The Appellate Rules of Procedure specifically prohibit the Government from introducing into the Appellate proceedings *extra record* materials. F.R.A.P. Rules 10 and 30, 28 U.S.C. Although some exceptions have been judicially created, Taxpayers submit that the instant case is not such an exception.

Intent in a contract is a question of fact which needs to be proved by competent contemporaneous evidence. Judicial notice of the 1985 diplomatic note after its introduction was waived by the Government in the trial court is a highly unusual act which obviously had a critical effect on how the Court viewed the case. The more critical an issue is to a case, the more reluctant courts should be to determine it by taking judicial notice. *Trans World Airlines, Inc. v. Hughes*, 308 F.Supp. 679 (S.D.N.Y. 1969), *modified on other grounds*, 449 F.2d 51, *reversed on other grounds*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577, *reh.den*, 410 U.S. 975, 93 S.Ct. 1434, 35 L.Ed.2d 707, *on remand*, 359 F.Supp. 783.

C. The Court Abused Its Discretion by Judicially Rewriting The Treaty Provision.

The Federal Circuit, instead of examining the contemporaneous record of the negotiations and the exhaustive analysis prepared by the Claims Court, chose

to virtually ignore both, and blindly accepted the Government's argument. Instead of citing competent evidence from the record, the Federal Circuit chose to reform the title of Article XV thereby rewriting the essence of the tax exemption clause. A court may not rewrite the contract to achieve an end it deems desirable, *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 678, 87 L.Ed. 877 (1943), nor add or detract from its terms as this is the function of the political branch. The courts have no treaty making powers. *The Amiable Isabella*, 6 Wheat. 1, 71-73, 5 L.Ed. 191 (1821). Likewise, reversing the Claims Court by a cursory reference to the record without any citations thereto to show the alleged error of the Claims Court is an abuse of discretion.

In the final analysis, there is nothing in the Federal Circuit's opinion that justifies reversing the Claims Court's judgment. The Federal Circuit's decision should be reversed on the basis of abusing its discretion.

CONCLUSION

There is no precedent that justifies the blind acceptance of the suspect cablegram that surfaced at the eleventh hour. Likewise, there is no precedent allowing a court to judicially rewrite a treaty when there is substantial competent and contemporaneous evidence in the record to support its plain meaning. For the above reasons, the United States Federal Circuit Court of Appeals decision in *Coplin v. United States*, 761 F.2d 688 (Fed. Cir. 1985) should be reversed and the decision of the United States Claims Court in *Coplin v. United States*, 6 Cl.Ct. 115 (1984) should be reinstated.

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Appendix

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Mr. Arthur J. Schissel
Chief, Legislation Section OCT 25 1977

Charles I. Kingson (Init.) C.I.K.
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Comments on State's draft bill regarding implementing legislation for the Panama Canal Treaty.

The draft legislation and related documents on the Panama Canal Treaty raise the following concerns:

1. Paragraph 2 of Article XV of the *Agreement in Implementation of Article III of the Panama Canal Treaty* ("Agreement") dealing with the taxation of United States citizens is unclear. This causes little problem as long as the legislative history clearly reflects that this provision refers only to an exemption from Panamanian taxes and the Agreement is an executive agreement which does not change existing United States tax law. However, if this Agreement is subject to the advice and consent of the Senate, we do not know whether it will have the status of a treaty, which probably overrides existing tax law. If so, more than legislative history may be necessary to assure that the tax exemption in Article XV applies only to Panamanian taxes.

2. Paragraph 3 of Article XV of the Agreement is also unclear. Does It exempt United States citizens from all Panamanian gift, inheritance and personal property taxes, or only insofar as those taxes apply

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2. Paragraph 3 of Article XV of the Agreement is also unclear. Does It exempt United States citizens from all Panamanian gift, inheritance and personal property taxes, or only insofar as those taxes apply

to property located in Panama which is brought there solely because of the employee's work with the Commission. Arguably, Panama could impose a worldwide-based gift, inheritance, or personal property tax, from which only property located in Panama would be exempt. The appropriate interpretation of this paragraph should be made clear.

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3 Finally, a question arises whether the treaty and related documents, or the draft legislation, changes the tax status of the Canal Zone as a "possession" of the United States for purposes of sections 931 and 936 of the Internal Revenue Code. Those sections afford certain tax benefits to United States citizens and corporations with respect to income earned in a United States possession. Given Panamanian sovereignty over the Canal Zone, there is a question as to the appropriateness of continuing preferential possessions tax treatment. The possessions status of the Canal Zone under our tax law should be clarified one way or the other.

Nos. 85-558, 85-559 and 85-560

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT E. O'CONNOR AND GLADYS E. O'CONNOR, PETITIONERS

v.

UNITED STATES OF AMERICA

PAUL H. COPLIN AND PATRICIA COPLIN, PETITIONERS

v.

UNITED STATES OF AMERICA

JACK R. MATTOX AND MARIA MATTOX, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court below correctly determined that Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10031, did not exempt the petitioners from United States taxation on the salaries that they received from the Panama Canal Commission.

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 761 F.2d 688. The opinion of the United States Claims Court (Pet. App. 9a-69a) is reported at 6 Cl. Ct. 115.

JURISDICTION

The judgments of the court of appeals were entered on May 10, 1985, and petitions for rehearing were denied on July 3, 1985 (Pet. App. 70a-71a). The petitions for a writ of certiorari were filed on September 30, 1985, and were granted on January 13, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

TREATY AND EXECUTIVE AGREEMENT INVOLVED

Article III, paragraph 9, of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10030, and Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, T.I.A.S. No. 10031, are set forth at U.S. App. 1a-2a.[1]

STATEMENT

1. On September 7, 1977, the United States and the Republic of Panama signed the Panama Canal Treaty, which was approved by the Senate and entered into force on October 1, 1979. That Treaty restored to Panama territorial sovereignty over the

[1] "U.S. App." refers to the appendix to the government's brief filed in this Court on December 3, 1985, in response to the petitions. "O'Connor Br." refers to the petitioners' brief in No. 85-558. "Coplin Br." refers to the petitioners' brief in No. 85-559. "Mattox Br." refers to the petitioners' brief in No. 85-560.

Canal Zone, while granting to the United States the right to manage, operate and maintain the canal until the year 2000 under the auspices of the Panama Canal Commission (Commission), an agency of the United States government (Pet. App. 3a).[2] Among the many questions addressed during the treaty negotiation was whether United States citizens employed by the Commission would be subject to Panamanian income taxes on their wages. The parties to the Treaty resolved that question by agreeing that such earnings would not be taxed by Panama. That determination is reflected in Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, also signed on September 7, 1977, which provides in pertinent part as follows:

TAXATION

1. By virtue of this Agreement, the Commission, its contractors and subcontractors, are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.

2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees and dependents shall be exempt from taxes, fees or

[2] The Commission is defined as a United States government agency in Article III(3) of the Treaty and in Article I(1) of the Agreement in Implementation of Article III. See also Panama Canal Act of 1979, Pub. L. No. 96-70, § 1101, 93 Stat. 456 (22 U.S.C. 3611).

other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

2. Petitioners Robert O'Connor, Paul Coplin and Jack Mattox are United States citizens who were employed by the Commission during the relevant tax years.[3] The wages they received from the Commission were included in computing their federal income tax for years 1979 (Coplin), 1980 (Mattox) and 1981 (O'Connor and Mattox). Thereafter, petitioners filed claims for refund for the amount of tax paid with respect to income received from the Commission, urging that Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty exempted that income from domestic taxation. The Internal Revenue Service denied each of their claims, and each petitioner filed a suit for refund in the Claims Court (Pet. App. 2a).

The Claims Court rejected the government's argument that Article XV of the Implementation Agreement was not intended to restrict the right of the United States to tax its citizens. The Claims Court determined that, even though the Executive Branch had consistently interpreted the Agreement as implicating only Panamanian taxes, a broad, literal interpretation of the Implementation Agreement was required because the government presented "no evidence whatsoever as to the interpretation given this language by Panama" (Pet. App. 1a-2a, 29a, 61a-66a, 68a-69a (emphasis omitted)). The court stated (*id.* at 38a) that "[w]ithout a statement from Panama it is of course difficult to be certain as to what its motivations might have been." Although acknowledging that the United States' position was "conceivable" and had "common sense appeal" (*id.* at 40a), the court concluded that several other "possibilities" as to Panama's motivations "come to mind" (*id.* at 38a-39a). And, based on its own "surmise and conjecture" (*id.* at 29a), the court rejected the Executive Branch's reading of the Agreement.

[3] Gladys E. O'Connor, Patricia Coplin and Maria R. Mattox are parties to these suits because each filed a joint tax return with her husband. Unless otherwise stated, we will refer to Robert O'Connor, Paul Coplin and Jack Mattox as petitioners.

3. The Federal Circuit unanimously reversed. Shortly before oral argument in the court of appeals, the Foreign Minister of the Republic of Panama delivered to the United States government a diplomatic note confirming that the Foreign Ministry of Panama agreed with the United States that Article XV of the Implementation Agreement was not intended to affect United States taxation of Commission employees (U.S. App. 4a-9a; Pet. App. 5a). The note stated U.S. App. 4a) that Article XV(2) was:

> discussed, negotiated, and drafted exclusively with respect to the tax exemptions that the Republic of Panama would grant to United States-citizen employees of the Panama Canal Commission and their dependents * * *. The aforementioned provision[] resulted from negotiations which did not deal with the United States authority to tax the individuals mentioned therein.

Petitioners moved to strike the official statement of the Panamanian government. In denying that motion, the court stated that its role in treaty matters was limited "'to giving effect to the intent of the Treaty parties'" (Pet. App. 6a, quoting *Sumitomo*

Shoji America, Inc. v. *Avagliano*, 457 U.S. 176, 185 (1982)). Since the treaty partners agreed that Article XV of the Implementation Agreement did not exempt the salaries paid to the Commission's United States citizen employees from United States taxation, the trial court's contrary determination was reversed (Pet. App. 6a-7a). In a concurring opinion, three members of the five-judge panel concluded (Pet. App. 8a) that "[a] complete reading of the record [before the Claims Court], the treaty and the Implementation Agreement" indicates that Article XV has no bearing on the power of the United States to tax its own citizens and that it is not necessary to consider the note from the Panamanian government to reach that result since the note "merely confirms the most reasonable interpretation of the Article."

SUMMARY OF ARGUMENT

The world-wide income of United States citizens is subject to taxation by the United States, regardless of the person's residence or the source of such income. Exemption from taxation is a matter of legislative grace and may never be founded upon implication. Rather, such exemption must be granted expressly and explicitly. Petitioners here claim that Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty constitutes such an express exemption, permitting them to avoid all taxation on the salaries received from the Commission. As the Federal Circuit properly recognized, the Agreement grants no such exemption.

This Court has long recognized that the judicial role in interpreting an international agreement, whether a treaty or an executive agreement (as is the Implementation Agreement), is limited to giving

effect to the intent of the treaty partners. In determining that intent, this Court has not limited its examination to the language employed, but has relied upon the history of negotiations and the proceedings before the Senate. Nor has this Court confined its search to documents presented to lower courts; it has examined records and expressions of intent of a foreign government that were presented to it for the first time. In addition, this Court has repeatedly held that the interpretation placed on an agreement by the Executive Branch, "the Nation's organ for foreign affairs" (*Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948)), is entitled to great weight. For that reason, deference to the Executive's view is the rule when the treaty partner is silent and even when it takes a view different from that taken by the United States. When, however, the parties to an international agreement agree as to the meaning of a treaty provision, this Court has held it inappropriate for any court to chart a different course.

The language of Article XV, the history surrounding its negotiations, and the proceedings leading to Senate ratification, all indicate that Article XV was not intended to restrict the right of the United States to tax its citizens working for the Commission, but rather was directed solely at defining the Panamanian tax status of the Commission, its agents and employees. Paragraph 2 (first sentence) of Article XV provides that "United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission." If there is any doubt that, in context, this refers only to Panamanian tax, that doubt is resolved by the paragraph's following

sentence, which exempts United States citizens employed by the Commission "from payment of taxes * * * on income derived from sources outside * * * of Panama." To read paragraph 2 as implicating any taxes other than Panamanian taxes, as the petitioners do, would give credence to the argument that even interest earned on United States bank accounts and dividends paid by domestic corporations are exempt from United States as well as Panamanian income tax, while similar income earned in Panama would be subject to both Panamanian and United States taxation.

Petitioners' reading of the treaty not only leads to absurd results, but ignores the fact that exemption from United States taxation for the Commission's United States citizen employees was never the subject of negotiations. The record reflects that there were four drafts of Article XV prepared by the United States negotiators between June 26, 1977, and August 24, 1977. The initial draft and all subsequent drafts, including the one adopted, are virtually identical. The record further indicates that the United States and Panamanian negotiators engaged in discussions over Panamanian taxation of the Commission's United States employees. But no mention was made of an exemption from United States taxation, as the note from the Panamanian government confirms.

Consistently with the history of the negotiations, the State Department advised the Senate that paragraph 2 of Article XV related exclusively to exemption from Panamanian income taxes, and not to United States income taxes. The Senate obviously was satisfied with the State Department's view, for it requested no action. The Senate committee report accompanying the Treaty specified that the State Department's comments were to be considered "an authoritative source of information with respect to the negotiating background and interpretation of the Treaties."

There is no factual basis for petitioners' speculation as to what might have transpired in the negotiations. Nor is there anything in the post-ratification history of the administration of the Treaty and Implementing Agreement to lend credence to petitioners' argument. The United States has always interpreted the agreement to provide for exemption from Panamanian taxation only. Even without regard to the Panamanian government's interpretation, such an Executive Branch interpretation of an international agreement is entitled to great deference.

In any event, the Government of Panama has now provided the United States with its official interpretation of the relevant provision. That interpretation is completely in accord with the interpretation advanced by the United States and adopted by the court below. Under the well-established teachings of this Court, the court of appeals properly considered the interpretation of the Panamanian government and correctly adhered to the mutual interpretation of the two parties to the Agreement.

ARGUMENT

THE INCOME PETITIONERS EARNED FROM THE PANAMA CANAL COMMISSION WAS NOT EXEMPT FROM UNITED STATES TAXATION

A. Petitioners' Income Is Fully Subject To Tax Under The Internal Revenue Code

The world-wide income of United States citizens is subject to taxation by the United States regardless of the citizen's residence or the source of such income. Internal Revenue Code of 1954, 26 U.S.C. 1; *Cook* v. *Tait*, 265 U.S. 47, 56 (1924). As has long been recognized, exemption from taxation is a matter of legislative grace and must be granted explicitly. *HCSC-Laundry* v. *United States*, 450 U.S. 1, 5 (1981); *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429-430 (1955); *Helvering* v. *Northwest Steel Rolling Mills, Inc.*, 311 U.S. 46, 49 (1940); *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939). There is no merit to petitioners' claim that Article XV(2) of the Agreement in Implementation of Article III of the Panama Canal Treaty constitutes such an express exemption, permitting them to avoid all taxation on the salaries received from the Commission.[4]

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[4] Unless the petitioners' salaries are exempt under paragraph 2 of Article XV, the income earned by United States citizens from employment by the Commission would unquestionably be subject to tax. The basic exemption applicable for United States citizens employed abroad is set forth in 26 U.S.C. 911, 912. The exemption provided by Section 911 is specifically made inapplicable to amounts paid by the United States or an agency thereof. Since the Commission is an agency of the United States, income received by a United States citizen as compensation for his work for the Commission would not be exempt from income tax under Section 911. *McCain* v. *Commissioner*, 81 T.C. 918, 921-924 (1983). The exemption provided in Section 912 for certain United States government allowances (*e.g.*, foreign areas allowances under certain statutes and cost-of-living allowances) is not applicable to the amounts involved in the instant case. See note 25, *infra*.

Nor do petitioners' salaries come within Section 931, which provides an exemption with respect to income derived from possessions of the United States. Although the term "possession of the United States" included the Canal Zone (Treas. Reg. 1.931-1(a)(1)), the salary or other compensation paid for services performed by a citizen of the United States as an employee of the United States government or of its agency was deemed for the purpose of Section 931 to be derived from sources within the United States (Section 931(h)) and thus did not fall within the exemption provided by Section 931. In any event, Section 931 is an historical relic as far as this case is concerned, for the Canal Zone ceased to be a possession of the United States as of October 1, 1979. (There is no claim in this case involving income earned prior to October 1, 1979.)

B. The Implementation Agreement Was Clearly Intended To Exempt United States Citizen Employees Of The Commission Only From Panamanian Taxes On Their Commission Salaries

1. *Controlling Principles Of Treaty Interpretation Require The Courts To Effectuate The Treaty Partners' Intent And To Give Great Deference To The Executive Branch In Determining That Intent*

Since the Implementation Agreement is an international executive agreement, its interpretation is subject to the same rules of construction applicable to treaties. *United States* v. *Pink*, 315 U.S. 203, 223-224, 227-230 (1942); *United States* v. *Belmont*, 301 U.S. 324, 330-332 (1937).

As this Court has indicated, the role of a court in interpreting international agreements is "limited to giving effect to the intent of the Treaty parties." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982). See also *In re Ross*, 140 U.S. 453, 475 (1891). In determining that intent, courts appropriately examine not only the language used in the treaty, but also the context in which the language is used, the history of negotiations underlying the agreement, and the proceedings before the Senate. See *Air France* v. *Saks*, No. 83-1785 (Mar. 4, 1985), slip op. 3-4, 6-8; *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 180, 184-185; *Factor* v. *Laubenheimer*, 290 U.S. 276, 294-295 (1933); *Nielsen* v. *Johnson*, 279 U.S. 47, 52 (1929). Because "few words possess the precision of mathematical symbols" (*Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952)), the judicial inquiry does not end with even seemingly unambiguous language where other factors, such as the conditions and circumstances existing at the time the provision was adopted, the question the provision was meant to resolve, and the practical construction adopted by the parties, indicate that an overly narrow reading of the language will not advance the treaty's aims. *Factor* v. *Laubenheimer*, 290 U.S. at 294-295; *In re Ross*, 140 U.S. at 475; *Great-West Life Assurance Co.* v. *United States*, 678 F.2d 180, 183 (Ct. Cl. 1982).[5] See also *FDIC* v. *Philadelphia Gear Corp.*, No. 84-

[5] In *Great-West Life Assurance Co.*, the language of the treaty contained no facial ambiguity and the parties stipulated that all of the literal requirements of the treaty provision granting an exemption were met. After examining the Senate Foreign Relations Committee report on the treaty and the accompanying documents from the State Department, the court held that the language of the treaty was not intended to grant the broad exemption claimed by the taxpayer.

1972 (May 27, 1986), slip op. 5-6. Thus, when confronted with two "plausible" readings of the language in a Treaty, this Court must "view the Treaty in the light of its entire language and history." *Kolovrat* v. *Oregon*, 366 U.S. 187, 192-193 (1961). See *TWA* v. *Franklin Mint Corp.*, 466 U.S. 243 (1984); *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).

While the ultimate goal of adjudication is to give effect to the treaty partners' intentions, it has long been settled that the construction of an international agreement by the Executive Branch is entitled to great deference by the courts in determining that intent. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 180-184; *Kolovrat* v. *Oregon*, 366 U.S. at 194; *Factor* v. *Laubenheimer*, 290 U.S. at 295. It is, after all, the Executive Branch that is charged with conducting foreign affairs. See *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-321 (1936); cf. *Haig* v. *Agee*, 453 U.S. 280, 293 (1981). For that reason, deference is the rule even when the treaty partner takes a view different from that taken by the United States.[6] *Factor* v. *Laubenheimer*, 290 U.S. at 298; *Charlton* v. *Kelley*, 229 U.S. 447, 473 (1913); *Whitney* v. *Robertson*, 124 U.S. 190, 194-195 (1888); *United States* v. *A.L. Burbank & Co.*, 525 F.2d 9, 15 (2d Cir. 1975), cert. denied, 426 U.S.

[6] Contrary to petitioners' contention (O'Connor Br. 33), these controlling principles of treaty interpretation do not depend upon whether the government is a party to the case; they are applicable in all cases involving an international agreement, for the objective remains the same: to effectuate the purpose of the signatories. *Great-West Life Assurance Co.* v. *United States, supra; United States* v. *A.L. Burbank & Co., supra; United States* v. *County of Arlington*, 669 F.2d 925 (4th Cir.), cert. denied, 459 U.S. 801 (1982).

934 (1976). When, as here, "the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, [the judiciary] must, absent extraordinarily strong contrary evidence, defer to that interpretation" (*Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 185).[7]

2. *The Language And Context Of The Implementation Agreement Demonstrate That No Exemption From United States Taxation Was Intended*

Any effort to ascertain the intent of the signatories to an agreement must begin with the language they employed. "The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 180, quoting *Maximov* v. *United States*, 373 U.S. 49, 54 (1963).

The language of Article XV shows that it was not intended in any way to restrict the right of the United States to tax its citizens working for the Commission. When read as a whole the article clearly reflects its purpose: to exempt the Commission and its United States citizen employees from taxation by

[7] In searching for guides to the intent of the treaty partners, this Court has not confined itself to documents presented to lower courts, but has examined records and expressions of intent of both the United States and of a foreign government that were presented to it for the first time. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 184 n.9; *Factor* v. *Laubenheimer*, 290 U.S. at 295 (the Court's order for reargument invited counsel to conduct a further search through available diplomatic records and correspondence); *United States* v. *Reynes*, 50 U.S. (9 How.) 127, 147-148 (1850).

Panama on income or property other than private business activities in Panama unrelated to the Commission.[8] Although the term "Panamanian taxes" does not appear anywhere in the article, it is clear from the context that only such taxes are intended. Thus, paragraph 1 exempts the Commission, its contractors and subcontractors from payment "in the Republic of Panama of all taxes, fees or other charges on their activities or property." Paragraph 3 exempts United States citizen employees of the Commission and their dependents from payment of taxes, fees or other charges on "gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to * * * their own or their sponsor's work for the Commission."[9] The first sentence of paragraph 2, which

[8] Petitioners contend (O'Connor Br. 34; Coplin Br. 5; Mattox Br. 7, 11), in effect, that analysis should begin and end with the phrase "any taxes," which they submit is unambiguous. But, as this Court has noted in other contexts, the word "any" is often an unclear guide to underlying intent. *E.g.*, *Ladner* v. *United States*, 358 U.S. 169, 170 n.1, 173 (1958) ("congressional meaning is plainly open to question on the face of the statute" (*i.e.*, "any person")); *Bell* v. *United States*, 349 U.S. 81, 83-84 (1955) (allowable unit of prosecution ambiguous under statute referring to "any woman or girl"); see *United States* v. *Kinsley*, 518 F.2d 665, 667-668 (8th Cir. 1975) (collecting cases).

More specifically, in cases involving treaty interpretation this Court has rejected efforts to wrench snippets of language out of context. The Court stated in *Petersen* v. *Iowa*, 245 U.S. 170, 173 (1917), that:

> if the mere letter of portions of the article when separately considered would leave room for any doubt on the subject, it would be dispelled by the context * * *.

[9] It is undisputed (Pet. App. 25a; O'Connor Br. 34) that paragraph 3 precludes only Panamanian taxation. Yet the language says the exemption is "from taxes," not merely

is at issue in this case, provides that "United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission." If there is any doubt that, in context, this refers only to Panamanian tax, that doubt is resolved by the paragraph's following sentence, which exempts United States citizens employed by the Commission "from payment of taxes * * * on income derived from sources outside * * * Panama." To read paragraph 2 as granting an exemption from United States as well as Panamanian taxation would give credence to the argument that even interest earned by United States citizens from United States bank accounts and dividends paid to those citizens by United States corporations are exempt from United States income tax. Yet, similar income generated in Panama would be subject to both Panamanian and United States taxation (with a foreign tax credit being given by the United States under 26 U.S.C. 33 and 901 for the Panamanian taxes).

Such an irrational pattern of taxation was clearly never intended by the signatories. Accordingly, without even considering the Panamanian diplomatic note, a large majority of courts (and the majority of judges on the Federal Circuit panel) has concluded that Article XV focuses exclusively on Panamanian taxation.[10] As those courts have held, the article's

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Panamanian taxes. That Panamanian taxes alone are precluded is gathered from the context. Further, no one disputes that paragraph 1 implicates only Panamanian taxation.

[10] The Tax Court and many district courts have interpreted Article XV, paragraph 2, of the Implementing Agreement to exempt salaries of United States citizen employees of the Commission from Panamanian income tax, not from United States income tax. *Smith* v. *Commissioner*, 83 T.C. 702

purpose is to extend protection to United States citizens employed by the Commission (a United States government agency) from taxation by Panama—just as employees of United States government agencies pay no income tax to foreign host-countries around

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(1984); *McCain* v. *Commissioner, supra; Bergmann* v. *Commissioner*, 50 T.C.M. (CCH) 158 (1985); *Vamprine* v. *Commissioner*, 49 T.C.M. (CCH) 210 (1984), appeal pending, No. 85-4150 (5th Cir.); *Collins* v. *Commissioner*, 47 T.C.M. (CCH) 713 (1983); *Rego* v. *United States*, 591 F. Supp. 123 (W.D. Tenn. 1984); *Stabler* v. *United States*, 84-1 U.S. Tax Cas. (CCH) ¶ 9153 (N.D. Tex. Nov. 30, 1983); *Hollowell* v. *United States*, 84-1 U.S. Tax Cas. (CCH) ¶ 9142 (M.D. Fla. Nov. 21, 1983); *Watson* v. *United States*, 592 F. Supp. 701 (W.D. Wash. 1983); *Corliss* v. *United States*, 567 F. Supp. 162 (W.D. Ark. 1983); *Highley* v. *United States*, 574 F. Supp. 715 (M.D. Tenn. 1983); *Pierpont* v. *United States*, 83-2 U.S. Tax Cas. (CCH) ¶ 9647 (D.S.C. Oct. 3, 1983); *Snider* v. *United States*, 53 A.F.T.R.2d (P-H) 349 (W.D. Wash. Sept. 23, 1983); *Stokes* v. *United States*, 83-2 U.S. Tax Cas. (CCH) ¶ 9644 (W.D. Wash. Aug. 29, 1983); unreported opinions in *Skrable* v. *United States*, No. 84-3053 (W.D. Ark. May 13, 1985), appeal pending, No. 85-1743WA (8th Cir.), and in *Foster* v. *United States*, No. 84-952-CIV-T-13 (M.D. Fla. Apr. 1, 1985), appeal pending, No. 85-3446 (11th Cir.). See also *Billman* v. *Commissioner*, 83 T.C. 534, 541 n.6 (1984). To the contrary, see *Harris* v. *United States*, 585 F. Supp. 862, 863 (N.D. Ga. 1984), aff'd, 768 F.2d 1240 (11th Cir. 1985), petition for cert. pending, No. 85-1011. In *Swearingen* v. *United States*, 565 F. Supp. 1019 (D. Colo. 1983), the court held that an executive agreement (which the Implementation Agreement is) exempting United States citizens from taxation is not within the constitutional powers of the President. In addition, the Tax Court has recently held that in the virtually identical provision of Article XVI of the Agreement in Implementation of Article IV of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10032 (U.S. App. 2a-3a), United States citizen employees of the United States Armed Forces stationed in Panama are not exempt from United States taxation. *Rust* v. *Commissioner*, 85 T.C. 284 (1985).

the world. The purpose was not to relieve anyone of his duty to pay United States taxes.

Only by removing the words "any taxes" in the first sentence of paragraph 2 from their proper context can the petitioners argue that an exemption from United States taxes was created. To be sure, had the negotiators anticipated the question raised in this case they could have employed language that disposed of petitioners' contentions even more clearly. But the degree of precision even skilled draftsmen employ is generally a function of the draftsmen's perception of the precision needed to resolve the question at hand.[11]

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[11] Petitioners (O'Connor Br. 34-39) seek support for their interpretation, as did the Claims Court (Pet. App. 26a, 46a-47a), by looking at other provisions of the Treaty and at other agreements. While some portions of the Treaty refer expressly to Panamanian taxes, fees, etc., other provisions that clearly affect only Panamanian taxes are written in terms similar to paragraph 2 of Article XV. See Agreement in Implementation of Article III at Article XI(2)(h) (T.I.A.S. No. 10031) (contractors "shall be exempt from any taxes"); Article XIV(2)(b) (vehicles "shall not be assessed any license or registration fees"); Article XVI(2), (5)(a) and (c). In any event, that certain other provisions may have been written with more precision would, at most, support a tentative inference that the power of the United States to tax its citizens was implicated. But, as we have indicated (page 10, *supra*) such inferences cannot support an exemption from domestic taxation. See, *e.g.*, *HCSC-Laundry* v. *United States*, *supra*.

The model for the taxation sections of the Implementation Agreement was Article X of the Status of Forces Agreement with the Republic of China, Aug. 31, 1965, United States-Republic of China, 17 U.S.T. 373, T.I.A.S. No. 5986, terminated January 1, 1980 (C.A. App. 68, 70). Article X(2) (17 U.S.T. 381) of the Agreement with the Republic of China provides:

> Members of the United States armed forces, or the civilian component, and their dependents, shall be exempt from any direct tax imposed on income, except income derived from sources in the Agreement Area other than that resulting from services with or employment by the United States armed forces or by the corporations provided for in Article XII of this Agreement or by other United States governmental establishments in the Agreement Area.

That provision, like other Status of Forces Agreements (SOFAs) (C.A. App. 88), was designed to exempt from host-country income taxes, service-related salaries earned in the host country and non-host country source income. Accordingly, neither that Agreement nor any of the many other SOFAs employing similar or more precise terminology has ever been construed to provide an exemption from United States taxation.

More directly, the language of the provisions in question derives from paragraph 2 of Article XVI of the Agreement in Implementation of Article IV of the Panama Canal Treaty (C.A. App. 88-89), which was modeled after the foregoing provision. That paragraph provides:

> Members of the Forces or the civilian component, and dependents, shall be exempt from any taxes, fees or other charges on income received as a result of their work for the United States Forces or for any of the service facilities referred to in Article XI or XVIII of this Agreement. Similarly, as is provided by Panamanian law, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

The Tax Court in *Rust* v. *Commissioner*, *supra*, rejected the taxpayer's argument that this paragraph exempts from United States taxation the salaries of the members of the United States armed forces, the civilian component and dependents. Even the Claims Court opined (Pet. App. 45a-46a) that exemption from United States taxation was not provided by the first sentence of that provision, which is identical in all relevant respects to the provision at issue here.

See *Ex parte Peru*, 318 U.S. 578, 596-597 (1943) (Frankfurter, J., dissenting) ("Legislation by even the most competent hands, like other forms of com-

position, is subject to the frailties of the imagination. Concentration on the basic aims * * * inevitably overlooks lacunae and ambiguities which the future reveals and which the future must correct."). And, as we now show, the language chosen in paragraph 2 was suitable to resolve the question under discussion —whether the wages of United States citizens employed by the Commission were to be subject to income taxation by Panama or any Panamanian authorities or agents.

3. *The Context In Which The Agreement Was Negotiated, The History Of The Negotiations And The Basis Upon Which The Senate Approved The Panama Canal Treaty, Confirm The Government's Interpretation That Exemption From Panamanian Taxes, Not United States Taxation, Was Intended*

The construction placed upon the Treaty by the United States, as well as by the Republic of Panama, is confirmed by the context in which Article XV was negotiated and by the negotiating history. Between February 26, 1904, and September 30, 1979, the United States exercised rights, power and authority over the Canal Zone that "it would possess and exercise if it were the sovereign" of the Zone "to the entire exclusion of the exercise of the Republic of Panama of any such sovereign rights, power or authority." Isthmian Canal Convention, Nov. 18, 1903, United States-Panama, art. III, 33 Stat. 2235, T.S. No. 431; 1977 Treaty, art. I(1)(a). See also, Treaty of Friendship and Cooperation with Panama, Mar. 2, 1936, United States-Panama, art. I, 53 Stat. 1807, T.S. No. 945. For several decades prior to entering into the 1977 Treaty, the United States operated the Panama Canal through its agent the Panama Canal Company

(Canal Company) and its predecessors. See Canal Zone Code, Pub. L. No. 87-845, § 61, 76A Stat. 8.[12]

The salaries paid United States citizen employees by the Canal Company were subject to United States taxation.[13] *McCain* v. *Commissioner*, 81 T.C. 918, 921-924 (1983); *Collins* v. *United States*, 299 F.2d 949 (Ct. Cl. 1962); Rev. Rul. 58-472, 1948-2 C.B. 30; 8 J. Mertens, *Law of Federal Income Taxation* § 45-61 (rev. ed. 1978). Moreover, pursuant to treaty, United States citizens residing in Panama and working for the Canal Company were not subject to Panamanian income taxes.[14] When the 1977

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[12] Title 2 was repealed by Section 3303(a)(1) of the Panama Canal Act of 1979, Pub. L. No. 96-70, 93 Stat. 499.

[13] Salaries paid to United States citizens working in a possession of the United States for the United States government or one of its agencies, like the Canal Company, were exempted from United States taxation between 1921 and 1951 if the employees otherwise satisfied the provisions of 26 U.S.C. (1940 ed.) 251(a) and its predecessors. Rev. Rul. 58-472, 1958-2 C.B. 30, 32. The provisions of Section 251(a) of the 1939 Code were first enacted in Section 262 of the Revenue Act of 1921, ch. 136, 42 Stat. 271, and were made effective as of January 1, 1921, by Section 263 of that Revenue Act (42 Stat. 271). Section 251 of the 1939 Code was amended by Section 220 of the Revenue Act of 1950, ch. 994, 64 Stat. 944, to preclude employees of the United States government or one of its agencies from obtaining the benefits of Section 251 of the 1939 Code. H.R. Rep. 2319, 81st Cong., 2d Sess. 58, 103 (1950); S. Rep. 2375, 81st Cong., 2d Sess. 48, 100 (1950). The relevant provisions of Section 251 of the 1939 Code and the exclusion of those benefits for employees of the United States government or of its agencies are found in Section 931 of the 1954 Code.

[14] Isthmian Canal Convention, art. X, 33 Stat. 2237; Treaty of Friendship and Cooperation with Panama, art. IV, 53 Stat. 1813; Treaty of Mutual Understanding and Cooperation with

Treaty became effective on October 1, 1979, the authority to exercise full rights of sovereignty in the area of the former Canal Zone was restored to the Republic of Panama (art. I(2) (T.I.A.S. No. 10030)), and the United States was granted the right to manage, operate and maintain the Panama Canal (art. III(1)).[15] The Commission became the agency through which the United States manages, operates and maintains the Panama Canal. Panama Canal Act of 1979, Pub. L. No. 96-70, § 1101, 93 Stat. 456 (22 U.S.C. 3611); 1977 Treaty, art. III(3), T.I.A.S. No. 10030. In changing the status of the United States' rights from plenary authority (as "if it were the sovereign" over a segment of Panamanian territory) to particular, functionally defined rights within a foreign nation, an obvious focus of concern was how Panama would thereafter treat the United States' agency and the agency's employees and their dependents who are United States citizens living and working under Panamanian jurisdiction. *Corliss* v. *United States*, 567 F. Supp. 162 (W.D. Ark. 1983); *McCain* v. *Commissioner*, 81 T.C. at 928. It is within that context that the parties agreed (1977 Treaty, art. III(9)) to provide for "the rights and legal status of United States Government agencies and employees operating in the Republic of Panama" in an implementing agreement. Thus, the stated raison d'etre of the Implementation Agreement, of which Article XV is a part, is to define rights of United States citizens with respect to Panama.

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the Republic of Panama, Jan. 25, 1955, United States-Panama, art. II, 6 U.S.T. 2273, T.I.A.S. No. 3297.

[15] The Treaty's Preamble acknowledges "the Republic of Panama's sovereignty over its territory."

It is fully consistent with this purpose that the negotiating history leading to the signing of the Panama Canal Treaty and its implementing agreements, and the ratification proceedings before the United States Senate, show that insofar as income taxes are concerned, the discussion focused solely on exempting from Panamanian taxation the salaries paid to the Commission's United States citizen employees. There was no discussion of exemption from United States taxation on Commission salaries or on other United States source income (C.A. App. 102, 105, 109, 112, 123-129, 152, 154, 162). As the record shows, the negotiations concerning Article XV, which was drafted by the United States (C.A. App. 17-18, 25-26, 192), took place during the so-called May 1977 round of negotiations that lasted at least into August 1977 (*id.* at 26, 63, 69, 113). The first internal United States draft (then numbered Article XVIII), dated June 26, 1977, provided in pertinent part as follows (C.A. App. 26, 71, 74):

TAXATION

1. By virtue of this Agreement, the Canal Administration is exempt from payment in the Republic of Panama of all taxes, fees or other charges on its activities or property, including those imposed through contractors or subcontractors.

2. United States citizen civilian employees, and dependents, shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Canal Commission. Similarly, as is provided by Panamanian law, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees, and dependents, shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Canal Administration.

At the June 30, 1977, negotiating session, the Panamanians pressed to tax the salaries of the Commission's United States citizen employees (C.A. App. 113, 116-117). The United States negotiators said that Panamanian taxation of those salaries would pose a great problem for the United States because "No employee of * * * the United States Government or of a government agency, is now subject to taxes in a foreign country; * * *" (*id.* at 115). The Panamanian negotiator suggested that perhaps the United States could concede primary taxing jurisdiction to Panama on such salaries through a tax credit mechanism (*i.e.*, the United States would tax the income, but give a credit for Panamanian taxes) (*id.* at 116-117). The United States said that no final answer could yet be given (*id.* at 115).

The second internal United States draft of Article XV (then Article XVIII) is dated July 10, 1977 (C.A. App. 75), and provides in pertinent part (*id.* at 77):

TAXATION

* * * * *

2. United States citizen civilian employees, and dependents, shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Panama Canal Administration. Similarly, they shall be exempt from payment of taxes, fees or other charges on income

derived from sources outside the Republic of Panama.[18]

* * * * *

At the July 11, 1977, negotiating session, the Panamanians continued to press the United States to allow Panama to tax the salaries of the Commission's United States citizen employees (C.A. App. 119-121). By then, the United States' position had hardened. Ambassador Linowitz stated (*id.* at 127):

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[16] Petitioners note that the second sentence of the first draft of Article XV(2) contained the phrase "as is provided by Panamanian law." Petitioners (O'Connor Br. 47; Coplin Br. 14-15) argue that the omission of that phrase indicates that a compromise was reached to exempt Commission salaries from United States taxation.

Petitioners read more into the removal of that phrase than the record will bear. The phrase merely reflected the fact that Panama, at the time that the agreements were negotiated, did not impose a tax on non-Panamanian source income. Removal of the phrase referring to Panamanian law assured the United States that if Panamanian law ever changed, Panama would still be under an international obligation to exempt from taxation the non-Panamanian source income earned by the United States citizen Commission employees.

In addition, as in paragraph 2 of Article XV, the term "any taxes" is used in paragraph 2 of Article XVI of the Agreement in Implementation of Article IV (relating to military matters). But again, in context, the taxes referred to are those of the host country in which the United States citizen is sent as an employee of the United States government or its agency, and not income taxes imposed upon United States citizens by the United States government. During the negotiations of the Panamanian taxation issue, the Panamanian negotiators recognized that the language of the SOFA was designed to exempt Defense Department personnel from Panamanian tax (C.A. App. 141). Adoption of similar language for Commission employees was intended to have the same effect and not a new effect—one never discussed—of exempting such employees from United States taxes.

Now, on the income-tax question we do not have a paper. We have had very extensive discussions within our Government and analyses by the Treasury Department, the Internal Revenue Service, and other groups to determine whether there is a way of responding favorably to your suggestion without raising very formidable problems in other parts of the world. We have been advised that the problem is one that we cannot deal with as you have proposed. The taxation of the income received by U.S. employees from the United States Government, wherever earned, would run counter to the policy that the United States has adopted throughout the world; and this would be the first effort to have a breach in that kind of a relationship. And, therefore, we have no authority to accede to your request on this score.

I can assure you we have tried in every way possible to explore the possibility; and, indeed, it is still being studied in some places in our Government. But I would be misleading you if I told you there is anything except a uniformly discouraging response that we have been receiving.

On July 12, 1977, the Panamanians again unsuccessfully urged the United States to agree that Panama could tax the salaries of the Commission's United States citizen employees (C.A. App. 134-141).

The next United States draft of Article XV (still Article XVIII) is dated July 13, 1977, and is identical to the July 10 draft (C.A. App. 78, 81). It was this draft that the United States first proposed to the Panamanian negotiators (*id.* at 26). On July 14, 1977, the Panamanians again tried without success

to persuade the United States to change its position on Panamanian taxation (C.A. App. 142-147).[17]

Whether the issue of taxation was again taken up is not clear (C.A. App. 148-149, 153-154, 157-158). But it is clear that nothing in the negotiating history suggests that anything other than the question of exemption from Panamanian taxation was ever considered. There is no mention in any document (either internal position papers or transcripts of the negotiations) that exemption from United States taxation was ever discussed.[18] The final version of Article XV, which deleted the word "civilian" in paragraph 2, was accepted without comment by the Panamanians

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[17] Petitioners' suggestion (O'Connor Br. 9-11) that there was a difference between the position taken by the United States "in-house" and in the negotiations with Panama is erroneous and arises from petitioners' selective reading of the record. In any event, had such differences existed they would have been irrelevant.

A memorandum to the Secretary of State dated July 19, 1977, "in preparation for discussion of economic aspects of the Panama Canal negotiations" (C.A. App. 150-152), indicates that the United States could address some of the Panamanians' economic concerns by acquiescing in Panamanian taxation of United States employees, but that such acquiescence would set an unfortunate international precedent. See also memorandum dated July 21, 1977, to the effect that the Panamanian position on taxes should be rejected (C.A. App. 161-162).

[18] The negotiating history of Article XV, as reflected in available documents at the State Department, was made a part of the record in the courts below and is available for this Court's consideration. Certain portions of the documents submitted to the Claims Court remain classified (see *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. at 320-321) and under seal by order of the Claims Court.

in August 1977 (C.A. App. 82-85, 192).[19] Thus, the government of Panama accepted the text drafted by the United States to reflect the United States' position.

Contrary to petitioners' contention (O'Connor Br. 47; Coplin Br. 14), there was no substantive change between the initial United States proposal and the final version of Article XV, paragraph 2, with respect to the exemption from taxation of the Commission salaries paid to United States citizen employees (see note 16, *supra*). The negotiations related solely to exemption of those salaries from Panamanian taxation, and exemption from United States taxation was never considered.[20]

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[19] Contrary to petitioners' allegation (Coplin Br. 14-15), the record clearly indicates that August was not the first time that Panama had seen the text of Article XV. See C.A. App. 26. The affidavit of Dr. Lopez Guevara merely states that the *final* text was proposed in August, 1977 (C.A. App. 192).

[20] Even the affidavit of Dr. Lopez Guevara, upon which petitioners rely, does not state that United States taxation was ever discussed (C.A. App. 192). His affidavit, as well as that of Michael G. Kozak (a member of the United States negotiating team) (*id.* at 27-28, 87-89), states that exemption only from Panamanian taxation was discussed. The Lopez Guevara affidavit provides only a personal interpretation of Article XV and states the affiant's belief that the Panamanian government would agree. He does not state, as petitioners indicate (O'Connor Br. 14), that Panama actually took the position that United States taxation was covered. His personal interpretation is of little value under the rules of treaty construction and his prophecy as to the view the Panamanian Government would take has not been borne out.

In addition to the affidavit of Dr. Lopez Guevara, the petitioners produced sworn statements from Messrs. Tack and Lakas (C.A. App. 182-191). Those statements have no probative value. Mr. Lakas' statement relies upon the response of

The Senate Committee on Foreign Relations held extensive hearings on the Panama Canal Treaty and its implementing agreements. Consistently with the history of the negotiations cited above, Herbert J. Hansell, Legal Adviser of the Department of State, testified (*Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. Pt. 1, at 214 (1977)) that "[w]ith regard to exemption from Panamanian taxes, the implementing agreements provide exemption from Panamanian taxes for U.S. agencies and their personnel, including dependents, and contractors." Senator Stone questioned Mr. Hansell on the point (*id.* at 268; U.S. App. 10a-12a (emphasis added)):

> Senator STONE. I think it was article XV, section 1 that raised an interesting question. I will read it to you. "By virtue of this agreement the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees, or other charges on their activities or properties." *Then, in No. 2, referring to U.S. citizen employees and depend-*

Mr. Tack. But Mr. Tack was not even involved in the negotiations of Article XV. Rather, Mr. Tack was involved in the treaty negotiations prior to 1977, before Article XV was negotiated.

The treatment of the Kozak affidavit by the Claims Court (Pet. App. 35a-36a n.16; Feb. 23, 1984 Tr. 31-32) and by the *Harris* court (768 F.2d at 1245) is wrong as a matter of law. Mr. Kozak, who is a deputy legal adviser of the Department of State, was one of the United States representatives responsible for drafting and negotiating the Panama Canal Treaty and its implementing agreements (C.A. App. 23, 27-29, 87-89, 156). The affidavit is clearly relevant to state the affiant's knowledge of what subjects were raised during the negotiations and the origins of the provision in question. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 184 n.10.

cnts, it says, "shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payments of taxes, fees, or other charges on income derived from sources outside the Republic of Panama."

Of course, when that was announced, the press reported the glee of the Zonians that they were now exempt from U.S. income tax. When Senator Glenn asked you, are there any words that you would like to see in the treaty, I was just asking myself, would you like to see the words, United States, in there somewhere?

Mr. HANSELL. I am sorry to be a source of disappointment for the Panamanians [*sic*], but obviously *we are not entering into an agreement between the United States and Panama that would exempt U.S. citizens from U.S. tax. The purpose of this, of course, was to exempt them from Panamanian tax.*

* * * * *

Senator STONE. Wouldn't you think that we could put in the understanding that I suggested to you, the clarification of our interpretation which then, when ratified by the Congress, by the Senate, and deposited, would clarify that in a little more formal way than simple advices, since you don't want to put words back in the treaty through negotiation?

Mr. HANSELL. The one comment I would have with respect to that, and this relates to a couple of other points, is that we are dealing now with an internal U.S. matter, not a matter between the United States and Panama. That is, *we don't agree with Panama how we are going to tax our citizens. That is obviously an internal matter.* I would hope we could find ways of dealing with internal matters other than as understandings.

As the Tax Court commented in *McCain* v. *Commissioner*, 81 T.C. at 928 (footnote omitted)—

> This interchange confirms the position urged by * * * the Commissioner of Internal Revenue. In providing for the termination of more than 70 years of U.S. jurisdiction to exercise rights, power, and authority as "if it were the sovereign" and for the return of control over the Canal Zone to the Republic of Panama, the United States would be concerned how the Republic of Panama would treat U.S. citizen employees of the Panama Canal Commission, a U.S. agency. One area of particular concern would be the imposition by Panama of any taxes on the agency or its U.S. citizen employees. On the other hand, as pointed out by Mr. Hansell, the imposition of taxes by either sovereign on its own citizens would not have been of concern to the treaty negotiators. Clearly, the United States would have no interest in negotiating with the Republic of Panama on whether it may tax its own citizens.

See also *Corliss* v. *United States*, 567 F. Supp. at 164, 165.

The Senate report accompanying the Panama Canal Treaty confirms the point made by Mr. Hansell. In the section-by-section analysis of the Treaty and its implementing agreements, the report states (S. Exec. Rep. 95-12, 95th Cong., 2d Sess. 155 (1978)):

> Paragraph 2 exempts United States citizen employees and dependents from the imposition by Panama of taxes on income received as a result of their work with the Commission and on the income derived from sources outside Panama. Such persons are subject, however, to Panamanian taxation of any income derived from

> sources * * * [inside] [21] Panama, other than their employment with the United States Government.

The report (*id.* at 127) emphasized that the section-by-section analysis was [22]—

> prepared by members of the treaty negotiating team and * * * [has] been approved by the offices of the State and Defense Departments directly involved in the negotiations * * *. Accordingly, these comments may be considered as an authoritative source of information with respect to the negotiating background and interpretation of the Treaties.

One of the drafters of the section-by-section analysis (Mrs. Geraldeen G. Chester) drafted Article XV of the Implementing Agreement (C.A. App. 25-26, 46, 64).

The purpose of Mr. Hansell's testimony and the section-by-section analysis was to inform the Senate during its deliberations of what transpired in the negotiations and the interpretation placed upon the Treaty and the Agreements by the State Department. Forming, as they do, the contemporaneous construction placed upon the Treaty and Agreement by the bodies constitutionally charged with making and ratifying the treaty, they should be regarded as the principal guide to interpretation. See *Stabler* v. *United States*, 84-1 U.S. Tax Cas. (CCH) ¶ 9153 (N.D. Tex. Nov. 30, 1983).

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[21] As the court in *Corliss* pointed out (567 F. Supp. at 166 n.1), the report, in an obvious mistranscription, referred here to "income derived from sources outside Panama."

[22] The section-by-section analysis was prepared during the ratification proceedings in 1977 and sent to the Senate Foreign Relations Committee by letter dated December 23, 1977. *Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. Pt. 3, at 689, 709 (1977).

Petitioners (O'Connor Br. 35 n.21; Coplin Br. 17, 33, 37-38; Mattox Br. 10-12) seek to turn Mr. Hansell's testimony on its head and transform his statement that a formal clarification was unnecessary into a concession that some domestic tax exemption springs from Article XV. A decision not to seek to enter into a formal understanding or clarification with the government of Panama after the negotiations had been concluded and the Treaty signed does not suggest that the negotiations involved exemption from United States taxation. Quite the contrary. The testimony before the Senate Foreign Relations Committee shows simply that the State Department believed that the subject of domestic taxation was not one on which clarification by Panama was warranted. The Senate obviously agreed with the State Department's view that the Treaty provided exemption from Panamanian taxation only (S. Exec. Rep. 95-12, *supra*, at 34) and did not request that the State Department seek clarification through a formal understanding with Panama. Had the Senate deemed clarification necessary, it could have requested further action, as it did with respect to other portions of the Panama Canal Treaty. See Reservations and Understandings; 124 Cong. Rec. 2693-2694, 10541 (1978). The Senate, however, concurred in the views expressed by the State Department. In these circumstances, Senator Stone's comment amounts, at most, to an inquiry by a single legislator concerning whether the meaning of Article XV(2) could usefully be clarified by a formal understanding. Nowhere, however, did Senator Stone, the Senate, or the Exec-

utive Branch ever contend that Article XV(2) in fact exempts United States citizens from United States taxation.

Petitioners (O'Connor Br. 35 n.21; Coplin Br. 33) further err in dismissing the section-by-section analysis as the product of two individuals who had not participated in the actual negotiations. The analysis was approved "by the offices of the State and Defense Departments directly involved in the negotiations" (S. Exec. Rep. 95-12, *supra*, at 127). Further, Article XV was drafted by one of the authors of the section-by-section analysis. The drafting of the provision in question and the section-by-section analysis was not done in vacuo. Like the testimony of Mr. Hansell, the section-by-section analysis was prepared by the State Department to inform the Senate about the negotiations, "not to aid the Internal Revenue Service in these cases." *Stabler* v. *United States*, 84-1 U.S. Tax Cas. at 83,185 n.4.

Nor is there any merit to petitioners' argument (O'Connor Br. 22-23, 42, 46-49; Coplin Br. 26) that Panama might have sought to have the United States exempt United States citizens from taxation as a compromise to break a diplomatic stalemate. First, petitioners' speculation is negated by the negotiating history which shows that there was no substantive change between the first internal United States draft of Article XV, prepared before the negotiations, and the final language. The negotiations related solely to the question of Panamanian taxation. At no time did Panama object to the imposition of United States taxes on any of the items or activities which, under paragraphs 1, 2, and 3 of Article XV, were exempt from Panamanian taxation. Rather, the negotiating history of Article XV shows that the Panamanian negotiators were not concerned with the manner in

which the United States taxed its citizens, but simply wanted to secure for their government a similar authority to tax.[23] Indeed, the Panamanian suggestion that both Panama and the United States (with a tax credit for Panamanian tax) might tax the salaries of the Commission's United States citizen employees clearly shows that Panama anticipated that United States taxes would be paid, and that Panama was willing to have such employees taxed at the higher United States rates so long as Panama got the first bite.[24]

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[23] The Claims Court emphasized that Panama's motivation in seeking to tax employees of a United States government agency arose from notions of sovereignty rather than economics. Whatever Panama's motivation might have been, it conceded the substantive point in the negotiations. There is no dispute that petitioner's Commission salaries are exempt from Panamanian taxation. The question here is whether an exemption from United States taxes was created, an issue which does not implicate either Panamanian sovereignty (which was secured in the Treaty's Preamble and Article I) or Panamanian revenue (also dealt with elsewhere in the Treaty).

[24] The Claims Court (Pet. App. 37a-42a) and the *Harris* court (768 F.2d at 1245 n.8) cited other provisions of the Implementation Agreement and the Panama Canal Treaty or other treaties in support of their conclusion that the Agreement barred United States taxation. Those other treaties have little bearing here because, as this Court noted in *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 185 n.12, other provisions "although similarly worded, may have different negotiating histories."

The *Harris* court cited the fact that the United States assumed certain obligations with respect to Commission employees in Article X of the Treaty. But the obligation imposed upon the United States under Article X of the Treaty runs to all employees of the Commission, the former Canal Company and the former Canal Zone Government, not just to those who

Petitioners suggest (O'Connor Br. 48-49) that there were sound policy reasons for granting a domestic tax exemption to the salaries paid to (and non-

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are United States citizens. Indeed, Article X shows that the Republic of Panama was eager to decrease the number of United States nationals working for the Commission. Article X(3) limits the employment of non-Panamanians to persons with skills not available in Panama, and provides for training of Panamanian employees, and Article X(5) requires the periodic rotation of non-Panamanians hired after the Treaty became effective. Moreover, Panama was eager for the United States to grant liberal entitlements to annuitants and thus to encourage United States citizens to retire so that Panamanian replacements could be hired. See S. Exec. Rep. 95-12, *supra* at 30, 135-136. In view of Panama's desire to reduce the number of United States nationals working for the Commission, Panama could scarcely have desired a provision exempting United States citizens from United States taxation, a benefit that surely would have discouraged voluntary departures by employees who were United States citizens.

The Eleventh Circuit's opinion in *Harris* also cites (768 F.2d at 1245 n.8) Articles XII (Entry and Departure), XIII (Services and Installations), XIV (Licenses), XVI (Import Duties), XVIII (Claims), and XIX (Criminal Jurisdiction) of the Implementation Agreement as examples of "special inducements" to encourage United States citizens to continue in the employ of the Commission. As we have shown, however, the express language of the Treaty reflects Panama's contrary desire: to reduce non-Panamanian employment. In any event, to the extent that the cited portions of the Implementation Agreement grant rights to United States citizen employees, they involve rights granted by *Panama*, not by the United States (see page 22, *supra*). For example, Article XII provides that United States citizen employees "shall be exempted from fiscal charges relating to their entry, stay in, or departure from" Panama. Article XIV(4)(c) provides that United States citizen employees who hold licenses issued by the United States, a state, or the former Canal Zone government, shall be issued equivalent Panamanian licenses "without being subjected to new tests or payments of new fees." Article

Panamanian source income earned by) United States citizen employees of the Panama Canal Commission, while permitting United States taxation of Pana-

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XVI(3) provides that certain goods, such as furniture, household goods and personal effects, shall be exempt from "the payment of import duties or other import taxes." (As is the case with the provision at issue here, these articles refer generally to "fiscal charges" and "import duties or other import taxes" without specifically identifying Panama as the taxing sovereign because only Panamanian authority was under consideration.) The other articles cited in *Harris* relate primarily to the rights of the Panama Canal Commission.

The Claims Court attempted to buttress its position by looking to income tax conventions between the United States and foreign governments. But it found no instance in which the United States discussed with a foreign country the domestic tax implications to United States citizens of their employment in that country by an agency of the United States. Nor is there any relevance in this case of treaties that provide tax credits against United States taxes for taxes paid to the treaty partner on foreign-source income. From the United States' point of view, those treaty provisions are largely redundant of the foreign tax credit provision, which has long been part of domestic statutory law. See 26 U.S.C. 33, 901-905.

More to the point, the foreign tax credit provisions do not constitute a surrender by the United States of tax jurisdiction over its citizens. Rather, they merely recognize that when United States citizens are subject to the taxing jurisdiction of the country in which the income is derived, the United States requires its citizens to pay a combined United States and foreign tax at least equal to the United States tax. That is a far cry from exemption from domestic taxation.

In the Swedish and German tax conventions cited by the Claims Court (Pet. App. 40a-41a), the United States agreed to refrain from taxing United States citizens who operate shipping and air transportation business in the other signatory states. But, those treaties contain savings clauses under which the United States may, regardless of any provision of those conventions, determine the tax of its citizens as if the conven-

manian-source non-Commission income. In fact, considerations of tax policy would dictate just the opposite conclusion. United States citizens employed by

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tions had not come into effect (Income Tax Convention with the Federal Republic of Germany, July 22, 1954, United States-Germany, art. XVI(1)(a), 5 U.S.T. 2768, T.I.A.S. No. 3133, and Income Tax Convention with Sweden, Mar. 23, 1939, United States-Sweden, art. XIV, 54 Stat. 1759, T.S. No. 958). Therefore, the provisions relied upon by the Claims Court provide no exemption from all taxes.

The Claims Court's comments about tax sparing, whereby the United States treats a United States corporation or citizen as having paid a foreign tax even though the foreign government relieves them of that tax, are particularly off the mark. While the United States has negotiated a few treaties with tax-sparing provisions (see, *e.g.*, the Income Tax Convention with Pakistan, July 1, 1957, United States-Pakistan, art. XV(1), 10 U.S.T. 984, T.I.A.S. No. 4232), none of those treaties has been ratified. See *Hearings Before the Senate Foreign Relations Comm. on Various Tax Treaties*, 97th Cong., 1st Sess. 10 (1981) (statement of John Chapoton, former Assistant Secretary of the Treasury for Tax Policy). In connection with the recent agreement with the People's Republic of China, the United States merely set forth its agreement (in an exchange of letters) to grant the People's Republic of China a tax-sparing provision if such a provision is ever granted to another country. Indeed, the refusal of the United States to conclude a tax-sparing agreement suggests that complete exemption from taxation is not favored. See, *e.g.*, C.A. App. 159-160; S. Exec. Rep. 5, 90th Cong., 2d Sess. 12-13 (1968); Schreyer, *Income Tax Treaty Between the United States and China*, 1984 Tax Mgmt. Int'l J. 259, 263; *United States Taxation and Developing Countries* 311-312 (R. Hellawell ed. 1980).

Finally, we note that in its consideration of the Tax Reform Act of 1985 (H.R. 3838, 99th Cong., 1st Sess. (1985)), the House Ways and Means Committee included a provision, Section 642, dealing with the effect of the Panama Canal Treaty and the Implementation Agreement upon United States taxation of citizens. The Committee Report (H.R. Rep. 99-426,

the United States government or its agencies, such as the Commission, are subject to United States taxation wherever they reside. Consistency in treatment therefore argues strongly against domestic tax exemption. Indeed, Congress had earlier expressed its disapproval of exemptions for military and civilian employees of the United States government and its agencies residing in certain possessions of the United States. See note 13, *supra;* H.R. Rep. 2319, 81st Cong., 2d Sess. 58, 103 (1950); and S. Rep. 2375, 81st Cong., 2d Sess. 48, 100 (1950). And, while the exemption from domestic taxation petitioners seek here has no sound policy basis, there is even less basis for the further exemption from taxation that is implicit in their argument. If this Court accepts petitioners' reading of the first sentence of Article XV(2), they would presumably make the same argument to secure an exemption under the second sentence (relating to their non-Panamanian source income). There could be no conceivable policy justification for exempting United States citizen employees of the Commission from taxation on interest, dividends or rent received from United States sources while taxing them on the same

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99th Cong., 1st Sess. 427-428 (1985)), after noting the conflict among the courts, points out that petitioners' reading of the treaty "is patently inconsistent with the intent of the drafters and with the views of Congress as reflected in well-established U.S. treaty policy" and that granting a complete exemption from all taxes "would have been completely inconsistent with the treaty policy of the United States not to alter by treaty the U.S. tax treatment of U.S. persons, particularly with respect to income from services performed for the U.S. Government or its agencies." As the House Committee pointed out, there is nothing to indicate that Congress intended to contravene its well-established taxation policies in entering into the Panama Canal Treaty and its implementing agreements.

type of income derived from Panamanian sources. See pages 38-39 note 24, *supra*. And, as we have pointed out (page 36 note 24, *supra*), such an exemption would have been contrary to Panamanian interests.[25]

In sum, the language of the Implementation Agreement, as construed in its proper context, the negotiating history and the ratification proceedings all clearly show that the treaty parties never contemplated an exemption from United States taxation.

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[25] There is no merit to petitioners' contention (O'Connor Br. 42 n.23) that a binational tax exemption can be found in the congressional formula allowing Commission workers to receive a supplemental allowance. As pointed out above (page 21 & notes 4, 13, 14), United States citizens who worked for the Canal Company, which was the United States agency operating the Canal prior to October 1, 1979, were subject to United States income taxation but were not subject to Panamanian income taxation. The Canal Company had discretion to provide to United States citizen employees additional allowances above basic compensation "for taxes which operate to reduce * * * the employee's disposable incomes in comparison with the disposable incomes of those employees who are not citizens of the United States" and could pay "an overseas (tropical) differential" (see Canal Zone Code, ch. 7, § 146, 76A Stat. 17). The authorization to pay additional amounts subject to domestic taxation is clearly not the equivalent of a tax exemption. Indeed, the present Commission likewise has discretion to provide additional allowances as "overseas recruitment or retention differential" (Panama Canal Act of 1979, Pub. L. No. 96-70 § 1217, 93 Stat. 465). These provisions merely maintain the status quo ante. *Smith* v. *Commissioner, supra*, 83 T.C. at 710-715. The legislative history of the post-treaty amendments to the formula for computing the allowance indicates that Congress did not believe that a binational tax exemption was created by Article XV(2). See H.R. Rep. 96-98, 96th Cong., 1st Sess. Pt. 1, at 33, 54-55 (1979).

4. *The Court Below Properly Accorded Weight To The Executive's Interpretation Of The Treaty And Properly Implemented The Interpretation Agreed To By The Treaty Partners*

As set forth at the outset, it has long been settled that the construction of an international agreement by the Executive Branch is entitled to great deference by the courts. See, *e.g.*, *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 180-184. The United States has not wavered in its interpretation of Article XV, and its interpretation is well grounded in the language and history of the provision.

One of the fundamental reasons for deferring to the Executive's interpretation of international agreements is that it is the branch of government "charged with * * * negotiation and enforcement" of such agreements (*Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 185) and cannot effectively discharge that constitutional function if its interpretations are lightly set aside. As this Court stated in *Haig* v. *Agee*, 453 U.S. at 292 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)): "matters relating to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." See *Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 19. There is, accordingly, no merit to petitioners' suggestion that an inference should be drawn against the United States because it did not accede to the trial court's request that the Panamanian government be approached and its views solicited. It is, of course, an Executive function to determine when, under what circumstances, and on what subjects to approach foreign governments. In this case, the government chose not to raise with the Panamanian government, at the trial court's

behest, a wholly domestic issue that had not been the subject of negotiations. The Claims Court chose to draw "a negative inference" (Pet. App. 66a) and rejected the United States' longstanding, consistent interpretation. Instead, the court (although acknowledging that it had no indicia of Panama's official position) concluded that the agreement "should be construed as Panama would read it" (Pet. App. 68a). In effect, the court accorded greater deference to its speculation as to the meaning of the *silence* of the Panamanian government (which is not a party to these proceedings) than it did to the expressed views of the Executive Branch of the United States. Such an approach is contrary to the circumscribed judicial role in foreign affairs which this Court has endorsed; it also would lead to alarming implications for the conduct of the foreign relations of the United States.

In any event, by the time this case reached the court of appeals, the official Panamanian view was known. The Foreign Minister of the Government of Panama informed the United States in a note dated February 22, 1985, that the Government of the Republic of Panama concurred with the United States' interpretation that Article XV(2) of the Implementation Agreement provided an exemption from Panamanian taxes only. In accordance with the decisions of this Court (*e.g.*, *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 183-184 (notes dated two months and five days before oral argument)), the court of appeals correctly considered this note.[26] Under well-

[26] Contrary to petitioners' arguments (O'Connor Br. 31-32; Mattox Br. 13), there is no meaningful distinction between this case and *Sumitomo Shoji*. In *Sumitomo Shoji* the Japanese government informed the United States government of its interpretation in a note dated two months before oral argument in this Court and reinforced that view in a note dated only five days before oral argument. The note in this case was dated ten days prior to argument in the court of appeals. Thus, there is no merit to the contention that the court of appeals should have ignored the Panamanian note, and even less merit to the notion that this Court should ignore a note submitted by a foreign government more than one year ago.

Nor is there merit to petitioners' claim that the court of appeals should have excluded the Panamanian note as a matter of judicial estoppel (O'Connor Br. 21, 24-26; Coplin Br. 40-42; Mattox Br. 17-18). That concept, which itself is not widely accepted (see *Konstantindis* v. *Chen*, 626 F.2d 933 (D.C. Cir. 1980)), precludes a party from taking different positions in separate causes of action based on the same facts. Of course, no two causes of action are here involved. The government has consistently urged that the Agreement does not bar United States taxation and has argued that the interpretation of the Executive Branch is to be accorded great weight, even if its treaty partner took a contrary position. That remains our position in this Court. As it happened, the treaty partner in this case has now explicitly concurred in the interpretation we urge. Certainly, this Court should not blind itself to this fact. See *Air France* v. *Saks*, slip op. 11.

established rules, when both government parties to a bilateral international agreement concur in its interpretation, it is inappropriate for courts to chart a different course.

To do so would be to ignore the central fact that this case concerns the interpretation of a treaty, not just a dispute between private individuals. This court stated in *Choctaw Nation* v. *United States*, 119 U.S. 1, 28 (1886), that the rules governing public treaties "even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations." See *Air France* v. *Saks*, slip op. 3 (quoting *Choctaw Nation* v. *United States*, 318 U.S. 423, 431-432

(1943)) ("[T]reaties are construed more liberally than private agreements."). The ultimate aim of treaty interpretation is to effectuate the expectations of the treaty signatories, just as the ultimate inquiry in interpreting a statute is to effectuate the expectations of the legislative body. According to petitioners' position, the interpretation of an international agreement should vary from litigant to litigant, depending upon the record before the trial court. That argument falls of its own weight.[27]

Further, contrary to petitioners' contention (O'Connor Br. 29-31; Coplin Br. 27), the basis of a foreign government's interpretation is not open to challenge in a court of the United States. Once a foreign government presents a statement dealing with matters within its area of sovereign authority, American courts are obligated to accept that statement at face value as "conclusive." *United States* v. *Pink*, 315 U.S. at 220-221.[28] American courts long have recog-

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[27] Petitioners' argument would mean that in this case an international agreement should be interpreted to grant an exemption from United States taxation to six taxpayers because the Panamanian government expressed its views after the record in the trial court had closed, but that in all pending cases where the official Panamanian statement could be included in the record the same agreement would bar that exemption.

[28] Petitioners (O'Connor Br. 17 n.13, 42) misconstrue the purport of the Panamanian note. The purpose of that note is to present the Panamanian government's interpretation of the provision in question. Cross-examination is hardly called for. Although the note's import was the communication of the official government view and not the views of the individuals mentioned therein, it should be noted that among those consulted by the Foreign Minister of Panama was Dr. Escobar, who was the chief Panamanian negotiator during the period when the provision in question was negotiated (U.S. App. 8a; C.A. App. 113, 119, 134, 143, 144, 154; S. Exec. Rep. 95-12, *supra*, at 184).

nized that considerations of comity among sovereign nations—the idea that foreign nations are due deference when acting within their legitimate realm of authority—play a role in determining "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895). See genearlly *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963); *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953); *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

In accordance with well-established canons governing the interpretation of international agreements, the position of the United States is supported by the language of the agreement, the negotiating history, and the uniform interpretation of both signatory powers. As the court of appeals properly held, petitioners are not entitled to a tax exemption to which the treaty partners never agreed.

CONCLUSION

The judgments below should be affirmed.
Respectfully submitted.

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Nos. 85-558, 85-559 and 85-560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL H. COPLIN and PATRICIA COPLIN,
Petitioners,
v.
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ROBERT E. O'CONNOR and GLADYS E. O'CONNOR,
Petitioners,
v.
UNITED STATES OF AMERICA

JACK R. MATTOX and MARIA MATTOX,
Petitioners,
v.
UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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TABLE OF AUTHORITIES

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On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR THE PETITIONERS

In their opening briefs petitioners put forward a substantial number of arguments in support of their claim that Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, T.I.A.S. No. 10030, exempts employees of the Panama Canal Commission from United States income taxes for work performed for the Commission in Panama. The

government's response warrants a brief reply. Because the structures of the separate opening briefs were somewhat different, petitioners' consolidated reply will basically follow the organization employed by Chief Judge Kozinski in his *Coplin* opinion, and the brief will reply to the government's arguments as they relate to the various findings and holdings that led the Claims Court correctly to decide for the petitioners.

A. Obviously, the single most important reason for the Claims Court's holding that Article XV exempts petitioners from United States income taxes in their work for the Panama Canal Commission is the plain language of the provision. The relevant Article is entitled simply "Taxation," and the relevant paragraph within the Article describes the scope of the exemption as including "any taxes," which on its face includes United States taxes. Indeed, if the contracting governments intended, as petitioners submit they did, to exempt petitioners from both Panamanian and United States taxes, it is difficult to imagine what other language could more plainly evince that intent. Although this plain language does not end the inquiry under traditional rules of treaty interpretation, it places upon the government a heavy burden to demonstrate that petitioners' interpretation "effects a result inconsistent with the intent or expectations of its signatories." *Maximov* v. *United States*, 373 U.S. 49, 54 (1963).

To satisfy its burden, the United States argues (U.S. Br. 20-22) that when read "in context," the "any taxes" language cannot reasonably be understood to embrace United States taxes. The government's reasoning on this issue is self-defeating. It points out that both paragraphs 1 and 3 of Article XV relate only to Panamanian taxes and from this the government concludes that paragraph 2 should be similarly limited. But the government inexplicably ignores the fact that paragraphs 1 and 3 also include specific references to *Panama*. Thus, the plain

language of these provisions, read in context, expressly limits their reach to Panamanian taxes. The absence of any similar limiting language anywhere in paragraph 2 creates a strong inference, in support of the plain language, that the scope of the tax exemption *is not limited to Panama*.

What makes the inference even stronger is that the language in Article XVI of the Status of Forces Agreement ("SOFA") in implementation of Article IV of the Panama Canal Treaty concerning military personnel, which served as the model for Article XV (U.S. Br. 19 n. 11), contains a specific reference to Panamanian law. That reference was deleted by the United States drafters, making Article XV on its face apply to "all taxes" without any limitation. Thus, understood *in context*, the language in Article XV exempts petitioners from all taxes for income received from the Commission.

The United States' explanation for the deletion is strikingly weak. It asserts (U.S. Br. 25 n.16) that petitioners' reliance upon the removal of the "Panamanian law" reference in Article XV is unsupported by "the record." But the brief cites *nothing* in the record to justify removal of the phrase. Instead, the government asserts, without support, that the doctoring of the provision was done to eliminate any problem in the event Panama changed its tax laws. But the government does not explain why this identical language would still be kept in Article XVI of the SOFA Agreement and removed from Article XV if the sole basis for the action was to respond to potential problems in Panamanian law. Thus, the more rational explanation for the disparate language is that the plain meaning of Article XV which exempts all taxes was intended by the parties.

The United States argues that the relevant sentence exempting United States taxes for work for the Commission must be amended judicially because petitioners' plain meaning interpretation "would give credence" to an

argument that all income "derived from sources outside . . . Panama" is also exempt under the Treaty. U.S. Br. 16. But that interpretation is not compelled by the language in the second sentence. In order to give meaning to the word "similarly" in the second sentence, it is perfectly reasonable to interpret the word "income" to mean "income received as a result of [Commission employees'] work for the Commission" which is "derived from sources outside of the Republic of Panama." This would mean that the cumulative effect of paragraph 2 would be that all income relating to Commission activities, from whatever source, would be exempt from both countries' taxing powers, but that each could tax non-Commission-related income under their domestic laws.

B. After finding that the plain meaning of the first sentence of Article XV, read in context, plainly provided a tax exemption, the Claims Court analyzed the negotiating history to determine whether there was clear proof that the signatories reached an understanding about the provision that departed from its clear language. As the Claims Court held: "there is *no* contemporaneous evidence as to the meaning either [party] placed on the language of Article XV. . . ." 6 Cl. Ct. 126 (emphasis in original). Obviously, then, there is no basis for relying upon the negotiating history to amend the language agreed to by the parties.

The government nevertheless selectively analyzes (U.S. Br. 25-27) the negotiating history and concludes that "nothing in the negotiating history suggests that anything other than the question of exemption from Panamanian taxation was ever considered." *Id.* at 27. To be sure, Panama's primary concern was to exercise its sovereignty over the Canal by being able to tax all employees there. It did, however, expressly propose that the United States grant Commission employees a tax credit so that the United States, in effect, would be taxing the employees, but giving some of the money to Panama. C.A. App. 117. Thus, contrary to the government's assertion, the negotiating history contains a Panamanian proposal to modify domestic United States' taxation in order to give effect to Panama's sovereignty over the Canal.

This discussion in the weeks leading up to the final draft proposal of Article XV by the United States significantly colors the effect that the government's proposal had on the Panamanian negotiators.[1] Instead of sovereignty concerns being dealt with by both parties retaining the right to tax, the United States proposed to solve the problem by allowing *neither party* to tax that income.[2]

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[1] The government's claim that the "record clearly indicates that August was not the first time that Panama had seen the text of Article XV" ignores the record and the Claims Court's contrary findings. The Court found that "the language that eventually became Article XV of the Implementation Agreement was not considered during any of the sessions for which we have a transcript or other contemporaneous documentation," which includes all of the sessions up to and including July 21. 6 Cl. Ct. at 131. The "record" the government relies upon for its contrary view is an answer to an interrogatory which merely indicates that the internal draft of Article XV dated July 13 was "the proposal presented to the Panamanian negotiators." C.A. App. 26. The answer does not indicate *when* that draft was presented to the Panamanians. Nor could it have; its author was not present at the negotiating sessions. Thus, the only available evidence indicates that the United States' proposal was made in August and accepted on the basis of the careful language employed by the United States which exempted "any taxes" and deleted the reference to Panama. The timing of the proposal undercuts the government's assertion that Panama accepted this proposal because it "reflect[ed] the United States' position." U.S. Br. 28.

[2] The government belittles as the product of "surmise and conjecture" the Claims Court's interpretation of the negotiating history as indicating that the parties reached a compromise on the sovereignty issue. But the government's alternative theory that "Panama accepted the text drafted by the United States to reflect the United States' position" is based on pure speculation. U.S. Br. 28. The Court's theory at least is consistent with the negotiating history. The United States cannot explain why Panama would

This interpretation is fully consistent with the United States' position that it could not tolerate Panamanian taxation of United States employees. Thus, the negotiating history supports petitioners' interpretation of the meaning of the Article. In any event, there is no explicit statement of understanding by both sides at the negotiating table indicating that paragraph 2 of Article XV applied *only* to Panamanian taxes, and therefore, the negotiating history does not satisfy the standards in *Maximov* for disregarding the plain language of the Treaty.[3]

C. After the Claims Court held that the language and history of Article XV, as agreed to at the bargaining table, provided a tax exemption to petitioners, the Claims Court considered whether any action by the parties subsequent to the agreement clearly demonstrated that they

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suddenly abandon its interest without any discussion on this issue about which it is undisputed the parties had previously been "widely divergent." 6 Cl. Ct. at 129.

[3] The government's ultimate response to the Claims Court's finding that the language of Article XV was the product of a compromise over the sovereignty issue is that the government would never enter into such an agreement because Congress and the Executive Branch generally disapprove of such arrangements. In the same breath, the government concedes that "the United States has negotiated a few treaties with tax-sparing provisions." U.S. Br. 38 n.24. There is thus nothing sufficiently unusual in the Claims Court's interpretation that would justify ignoring the plain language employed by the treaty signatories.

Moreover, even if the Agreement provided unique treatment for Canal Commission employees, that would not be unusual. Those employees have been treated differently by the United States in a host of different ways. For instance, Commission employees have no access to PX or Commissary services, are not paid out of the United States Treasury, have a separate leave system, and are provided a "tropical differential" in their salary. Indeed, prior to 1954, employees of the Commission, in effect, did not pay United States income taxes. Thus, the Agreement is fully in keeping with Congress' past practices toward Commission employees.

actually intended the provision to have the meaning now ascribed to it by the United States in its pursuit of additional tax dollars. The Claims Court held that no post-agreement, pre-litigation materials were sufficient to overcome the plain meaning doctrine in interpreting Article XV.

The government emphasizes heavily (U.S. Br. 29-32) the legislative history of the Senate ratification process. Oddly, the government cites not a single case from this or any other court concerning what role this legislative history should play in determining the meaning of Article XV. Ordinarily, internal deliberations of *one* of the signatories to an international agreement is not relevant to interpreting that agreement, because the Court must determine what *both* parties understood the agreement to mean. *Fourteen Diamond Rings*, 183 U.S. 176, 180 (1901); Restatement (Second), Foreign Relations Law of the United States § 147 (1965). Nevertheless, the legislative history is almost as silent as the negotiating history on the critical issue of whether Article XV's exemption is limited to Panamanian taxes. The section-by-section analysis, quoted by the United States (U.S. Br. 31), clearly states that Article XV exempts Commission employees from Panamanian taxes, but does *not* state that the exemption is *limited* to Panamanian taxes. S. Exec. Rep. 95-12, 95th Cong., 2d Sess. 155 (1978). Given the importance to the government, as reflected in the internal documents created during the negotiating process (See C.A. App. 152, 154, 162), of exempting United States employees from Panamanian taxes, the State Department's decision to emphasize this point is understandable. State was concerned that if Panama could tax employees of an agency of the United States, opponents of the Treaty would try to use that fact to defeat its ratification. C.A. App. 162. The Senate Report thus clarifies one issue but does nothing to clarify the issue presented here—the effect of Article XV on

United States' taxes. The section-by-section analysis is silent on that issue.[4]

The government places particular emphasis upon the exchange during the Hearings between Herbert J. Hansell, Legal Advisor of the State Department, and Senator Stone. But that exchange does not warrant amending the Agreement judicially. In the first place, the government cites no case, and we are aware of none, in which this Court has relied upon a single statement made during a hearing as the sole basis to justify ignoring the plain meaning of a statute, much less a treaty. See *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493 (1931); *March* v. *United States*, 506 F.2d 1306, 1314 n.30 (D.C. Cir. 1974). Second, what is truly meaningful from the exchange is the contrast between the clarity of Hansell's statement at the hearings compared to the statement in the Senate Report. The latter, which could serve as a legitimate basis for inferring the Senate's understanding of Article XV, is silent with respect to United States taxes. Third, the exchange is ambiguous. Hansell's promise was to find some way, short of using an understanding, to resolve the problem identified by Senator Stone. The United States reasons that because the Senate did not seek a reservation or understanding on Article XV, the Senate must have agreed with Hansell's statement. An equally plausible explanation for Senate inaction is that the Senate was satisfied

[4] Even if the Court were interpreting an ordinary statute of Congress, instead of a provision in a Treaty's implementing agreement, the statement in the Senate Report would not suffice to warrant ignoring plain language in the statute as enacted. It is well settled that statements of legislators and other legislative materials should not be used to construe a statute contrary to its plain terms. *See Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979). "Such aids are only admissible to solve doubt and not to create it." *Railroad Commission of Wisconsin* v. *Chicago, B. & Q.R.R.*, 257 U.S. 563, 589 (1922).

with the exemption embodied in the plain meaning of the Agreement. Alternatively, Hansell's promise to resolve the matter without using an understanding would fully explain why the Senate did not act independently. It may have relied upon Hansell's representation that the matter could be resolved without recourse to that particular diplomatic channel. The Senate's reliance was misplaced, but that provides no basis for this Court to disregard the language in the Agreement.[5]

D. Even though the Claims Court held that the government's interpretation of Article XV was unsupported by the language of the Agreement, the negotiating history leading up to the Agreement and events prior to its ratification, the Court nevertheless carefully considered and rejected the government's claim that the Executive Branch's interpretation of this international agreement is entitled to "great deference." 6 Cl. Ct. 135-143. The government strongly renews its argument here and asks that its self-serving interpretation of Article XV be upheld, regardless of all other considerations.[6] What the United

[5] The government's use of the legislative materials is completely misguided. It assumes that the petitioners must find evidence that the Senate expressly intended to exempt them from having to pay United States taxes on Commission based income. Because of the plain language of the Agreement, however, it is the *government's* burden to show that the Senate clearly understood the language as having the special meaning argued for by the government.

[6] The government argues (U.S. Br. 13) that deference to its interpretation is warranted even if the Court is convinced that this interpretation conflicts with the understanding of our treaty partner at the time of the Agreement. This is not the law. The cases cited for this extraordinary proposition do not support such a rule. In *Factor* v. *Laubenheimer*, 290 U.S. 276, 298 (1933); *Charlton* v. *Kelly*, 229 U.S. 447, 473 (1913); and *Whitney* v. *Robertson*, 124 U.S. 190, 194-195 (1888), cited by the government (U.S. Br. 13), the Court did not hold that the Executive Branch's interpretation must be respected, even if it is contrary to the contemporaneous understanding of a treaty partner. The Court decided the very different issue of whether it should disregard a treaty obligation

States does not discuss are the reasons why the Court defers to the Executive Branch on such issues and whether those reasons apply in this case. Obviously, if they do not, then the Court should not defer to the government's proposed interpretation because in no event are the views of the Executive Branch conclusive upon the Court; "courts interpret treaties for themselves." *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961); *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184 (1982).[7]

The Claims Court correctly identified the reasons for deferring to the federal government's interpretation of an international agreement—1) the Executive Branch has negotiated the Treaty and therefore may have unique insights into the parties' state of mind; 2) the Executive Branch is responsible for conducting foreign affairs and the Court's interpretation of a Treaty could interfere with those relations; 3) the Executive Branch administers the treaty and therefore may have expertise derived from experience with the treaty which could assist the Court. Restatement (Second), Foreign Relations Law of the United States, § 147(1)(c), (f), (h).

The government in its brief makes absolutely no attempt to show that *any* of these factors applies here. First, it has always been conceded that the State Department has no contemporaneous evidence concerning the

assumed by the United States because the other signatory refused to abide by the provision. Those cases do not support the government's claim of slavish judicial deference to the Executive Branch's interpretation. Indeed, the government's claim would effectively nullify the rule that the interpretation of the Executive Branch is "not conclusive" on the Court. *Charlton* v. *Kelly*, 229 U.S. at 468.

[7] In *Sumitomo*, this Court made clear that the extent of the deference due to the Executive's interpretation depends greatly on whether "that interpretation follows from the clear treaty language. . . ." 457 U.S. at 185. Where, as here, the Executive's interpretation clearly serves selfish financial interests, and it conflicts with the language of the Agreement, the Executive's interpretation should be rejected.

negotiations leading up to the August session during which Article XV was finally proposed. Second, the government has never indicated that Panama or any other nation would be concerned at all if the Agreement were interpreted in accordance with its plain meaning.[8] Finally, there have been no "subsequent practices of the parties in the performance of the agreement" concerning Article XV that could serve as the basis for the Executive Branch's interpretation. Restatement (Second), Foreign Relations Law of the United States, § 147(1)(f). To the contrary, the agency charged with administration of the Treaty, the Panama Canal Commission's Supervisory Board, clearly indicated through its Panamanian members that it understood the Agreement to provide a tax exemption for United States' citizen employees. See O'Connor Br. 40-41. The government ignores these statements, but, if deference is owed to anyone, it is to the Board, and its understanding of the Agreement contrasts sharply with that of the Executive Branch. Thus, the government's argument amounts to no more than a request for deference for the sake of deference. This is no basis for rejecting the plain meaning of an international agreement.

E. The one item that the Claims Court could not evaluate was the diplomatic note mysteriously obtained from Panama on February 22, 1985, and filed with the Federal Circuit on the eve of oral argument. Not only was no diplomatic note produced in the Claims Court, but counsel for the government *repeatedly* represented to the Court that 1) no diplomatic note could be obtained; 2) any note the State Department might obtain would be irrelevant to this case; and 3) the government wanted the case to be decided solely on the record before the Claims Court as of March 8, 1984. 6 Cl. Ct. at 147.

[8] We analyze the post-litigation, diplomatic note in the next section, but it is worth mentioning here that nothing in that document expresses any concern about U.S.-Panama relations if the Agreement is interpreted to exempt all taxes.

The government's desperate use on appeal of the diplomatic note in light of the statements made to the Claims Court is the best evidence of the manifest weakness in the government's interpretation of Article XV under the ordinary rules of treaty construction. Given the suspect circumstances surrounding the production of this note, which are discussed in petitioners' opening briefs (Coplin Br. 30-31; O'Connor Br. 14-17), the government's decision to rely upon it could only be justified by a strongly felt sense of need to rehabilitate its case on appeal. In light of the strength of the Claims Court's opinion, the government's concern was well founded. But the desire to win a case does not justify the government's blatant disregard for the ordinary judicial process.

In this Court, the government asserts, at the end of its summary of the traditional methods of interpreting international agreements, that "[i]n any event, the Government of Panama has now provided the United States with its official interpretation of the relevant provision," (U.S. Br. 9),[9] and therefore, the Court need not concern itself with the flaws in the government's case.

Petitioners submit that the diplomatic note is entitled to little or no weight under traditional rules of treaty interpretation. Alternatively, the Court certainly should not permit the government, after its representations to the Claims Court, to benefit from the note in these cases. The Court should not accept the note at face value as the Federal Circuit did. Certainly the Court should not affirm without allowing a factual inquiry into the circumstances surrounding the government's complete reversal of position and its acquisition of the diplomatic note. To

[9] Given the government's unwillingness to reveal the circumstances surrounding the acquisition of the note, there is no small irony in the fact that the reference to "its" in the quotation from the government's brief could quite reasonably be read to refer to the "United States."

hold otherwise would violate fundamental notions of fair play that underlie the adversary process.

1. The Restatement (Second) on Foreign Relations Law contains a list of nine factors to be considered in interpreting any treaty. This list does not include a non-contemporaneous diplomatic note created and produced during the course of litigation. Restatement (Second) § 147(a)(i). Although the list was not intended to be exhaustive, the American Law Institute's reason for excluding a note like that from Panama is obvious. Such a *post hoc* recital is largely useless if not misleading, in attempting to understand the intent of the parties to an agreement reached many years before.[10] Thus, as an interpretative aid, this note is no more authoritative than a statement of a subsequent Congress about a law previously enacted, which is accorded little or no weight in interpreting the earlier legislation. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958).

The government argues that this Court's decision in *Sumitomo* clearly supports reliance on the Panamanian note. The note in *Sumitomo* was very different; it did no more than indicate Japan's agreement with the preexisting interpretation of this government and it was based on extremely unambiguous language. Indeed, even though the parties to the treaty in *Sumitomo* agreed on an interpretation that "follow[ed] from the clear treaty language," this Court did not end its inquiry there. 457 U.S. at 185. In sharp contrast to that case, the government here asks the Court to disregard the plain meaning of the Agreement in light of a diplomatic note, created

[10] Cf. Fed. R. Evid. 803(6), 804(8); *Palmer* v. *Hoffman*, 318 U.S. 109, 114 (1943) (rejecting certain business records "calculated for use essentially in the court, not in the business"). What the Court said in *Palmer* about the railroad's report can be applied directly to the unpublished diplomatic note: "its primary utility is in litigating," not in diplomacy. *Id.*

for no reason except to further this government's interest as a *litigant*. This plainly is not *Sumitomo*.

Moreover, the rule proposed by the government is extremely shortsighted. Under this theory, any change in the administration of either government provides a complete opportunity to rework any international agreement without having to go through the treaty-making process. Thus, no agreement has any set shelf life. Such a rule will clearly have an adverse effect on the willingness of other nations to enter into bilateral agreements with this government.

Under the government's theory, the Senate's understanding of a treaty can always be rejected by a new administration if it can convince a treaty partner to supply a diplomatic note. This demeans the Senate's ratification power and conflicts with the basic notion that "[a] treaty, then, must be a *bona fide* agreement between states, not a 'mock marriage,' nor a unilateral act by the United States to which a foreign government lends itself *as an accommodation* . . . .". L. Henkin, Foreign Affairs and the Constitution 143 (1972) (emphasis added). In order to accord proper respect for the treaty-making process, the Court should reject the use of diplomatic notes unless: 1) they are produced as part of the ordinary process of administering an international agreement, as opposed to being used solely in anticipation of use in litigation, Restatement (Second), Foreign Relations Law § 147 (referring to the performance under the treaty); or 2) unless, as in *Sumitomo*, the note merely reinforces the conclusion compelled by all other available interpretative factors concerning the treaty. Under these standards, the note in this case should not be given the dispositive weight requested by the United States.

2. If, however, the Court in the abstract would be willing to give some weight to Panama's diplomatic note, it is clear that in this case the government should be bound by its representations to the Claims Court that no note would

be forthcoming and that, even if such a note existed, it would not be relevant. The government's response to petitioners' argument that its litigating tactics were grossly unfair is deeply disturbing. First, it argues that technically this is not an appropriate case for judicial estoppel because the government is not taking inconsistent positions in separate lawsuits. U.S. Br. 43 n. 26. This is hardly a defense; it is, if anything, worse for the government to take an absolutely inconsistent position *in the same case on appeal* and thereby to render the trial court proceeding meaningless. Second, the government argues that it has been consistent in this litigation because all along it has wanted to win this case. But, a uniform desire to win does not justify the government's decision to reject the need for a note in the trial court and yet rely upon the note on appeal. Finally, the government offers its most cynical argument—this Court should "not blind itself" to the valuable information in this diplomatic note. Instead the government asks the Court to "blind" itself to the unfairness inherent in the government's action and the affront to the Claims Court. If the Court must choose, it should disregard the note in order to remedy the government's attempt to render the trial court proceedings a nullity.

3. At a minimum, the Court should not accept the diplomatic note at face value and rely upon it to interpret Article XV in a manner that conflicts with its plain meaning. Obviously, petitioners strongly believe that the Court should reverse the judgment of the court of appeals on the basis of the plain meaning of the Agreement, but if the Court is unpersuaded, it should not simply affirm. The Claims Court should be given an opportunity to inquire into why the United States government shifted its position on appeal.[11] Certainly, peti-

[11] Petitioners recognize and are sensitive to the unusual inquiry called for on remand. An inquiry into diplomatic efforts and motivations should be permitted only in extraordinary circumstances.

tioners' claim would be significantly enhanced if the representations made to the Claims Court reflected unsuccessful efforts by the State Department to obtain similar notes in the past from the Panamanian government which had negotiated and signed the treaty. This would be strong evidence that the Claims Court was correct that Panama understood the Agreement to embody a compromise at the time it was signed. The only way to determine that issue, however, is to remand the matter for further discovery and a determination of whether the government has dealt fairly with the Claims Court and the petitioners in this case.

* * * *

The fundamental flaw in the government's submission to this Court is that it refuses to deal with the basic issue in this case: what did Panama and the United States agree to *in August 1977*. The government has gone to great lengths to demonstrate what the State Department, the new Panamanian regime and even the House of Representatives might prefer *today*, but it has made no serious challenge to the Claims Court's findings and holding concerning the expectations of the parties in light of the negotiations leading up to the final agreement and the language actually chosen in 1977.

The government's attempted sleight of hand must fail. Its *post hoc* "evidence of intent" created because of litigation provides no basis for this Court to rewrite the agreement in order to deprive petitioners of the third-party beneficiary rights which are contained in Article

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But, it is the government which has caused this problem by making very clear representations in the Claims Court and acting directly contrary to those statements on appeal. If the government would prefer to avoid the problem caused by its conduct, it could ask the Court again to decide the case on the record before the Claims Court. If, because of the weakness of its interpretation without the diplomatic note, the government prefers to have the note considered, then it should be prepared to submit its actions to judicial scrutiny.

XV. If Panama and the United States are now in agreement that Article XV is no longer warranted, there are methods available to effect that result. The course the government has chosen—asking this Court to amend the Agreement—is not one of them. The Court therefore should decline the government's invitation to substitute itself for the political branches of the governments of the United States and Panama and instead exercise solely its judicial function by enforcing the plain meaning of Article XV.

CONCLUSION

For the foregoing reasons and those stated in the opening briefs of the petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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October 3, 1986

Nos. 85-558, 85-559, and 85-560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT E. O'CONNOR and GLADYS E. O'CONNOR,
Petitioners,
v.
UNITED STATES OF AMERICA

PAUL H. COPLIN and PATRICIA COPLIN,
Petitioners,
v.
UNITED STATES OF AMERICA

JACK R. MATTOX and MARIA MATTOX,
Petitioners,
v.
UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MOTION FOR LEAVE TO FILE POST ARGUMENT A SUPPLEMENTAL BRIEF FOR THE PETITIONERS AND SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-558

ROBERT E. O'CONNOR and GLADYS E. O'CONNOR,
Petitioners,

v.

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PAUL H. COPLIN and PATRICIA COPLIN,
Petitioners,

v.

UNITED STATES OF AMERICA

No. 85-560

JACK R. MATTOX and MARIA MATTOX,
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UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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MOTION FOR LEAVE TO FILE POST ARGUMENT A SUPPLEMENTAL BRIEF FOR THE PETITIONERS

Pursuant to Rule 35.5 of the Rules of this Court, petitioners move for leave to file after argument the accompanying brief to apprise the Court of the final enactment of the Tax Reform Act of 1986, Pub. L. No. 99-514, and "to analyze and argue as to the impact of" Section 1232(a) of the Act "on the questions pending before the Court." R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 575 (6th ed. 1986). See *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983); *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983).

On October 22, 1986, President Reagan signed into law the Tax Reform Act, which contains a provision relevant to this case. Section 1232(a) provides:

> "Nothing in the Panama Canal Treaty (or in any agreement implementing such Treaty) shall be construed as exempting (in whole or in part) any citizen or resident of the United States from any tax under the Internal Revenue Code of 1954 or 1986. The preceding sentence shall apply to all taxable years whether beginning before, on, or after the date of the enactment of this Act (or in the case of any tax not imposed with respect to a taxable year, to taxable events after the date of enactment of this Act)."

Obviously, the provision is intended to eliminate the claim of petitioners, and others like them, that Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, T.I.A.S. No. 10030, exempts U.S. employees of the Panama Canal Commission from U.S. taxes on Commission-related work. Because the statute did not become effective until after the oral argument in this case,* petitioners have had no opportunity to analyze for the Court the effect of the statute on the issues presented. Accordingly, petitioners submit that their motion for leave to file a post-argument supplemental brief should be granted.

Respectfully submitted,

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October 29, 1986

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* When petitioners filed their Reply Brief, the Tax Reform Act in the main had passed both Houses of Congress. Because the bill was still subject to technical changes, it was not ready for the President's signature prior to the argument on October 14, 1986. Petitioners waited until it was clear that no new law would be in effect before filing their reply. Petitioners at that time decided it was unnecessary, and indeed, unwarranted to analyze the effect of a law that was not finalized. Accordingly, this is the first appropriate occasion for petitioners to discuss the relevance of Section 1232(a).

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-558

ROBERT E. O'CONNOR and GLADYS E. O'CONNOR,
Petitioners,

v.

UNITED STATES OF AMERICA

No. 85-559

PAUL H. COPLIN and PATRICIA COPLIN,
Petitioners,

v.

UNITED STATES OF AMERICA

No. 85-560

JACK R. MATTOX and MARIA MATTOX,
Petitioners,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

On October 22, 1986, the President signed into law the Tax Reform Act of 1986. Pub. L. No. 99-514. Prior to the argument on October 14, 1986, the Solicitor General, with petitioners' consent, lodged copies of Section 1232(a) of the Tax Reform Act of 1986 as passed by Congress, which is relevant to this case.[1] Petitioners are filing this Supplemental Brief to discuss what, if any, effect, the new provision should have on the Court's disposition of this case.

1. The easiest and most appropriate course for the Court to follow would be to ignore the new provision for the purpose of deciding the questions presented in the petitions for writs of certiorari. The Court can, and should, decide what the United States and Panama intended in 1977 when they finally agreed upon the exact language in Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty. If the Court holds that the plain language, structure and negotiating history of the Agreement demonstrate that United States' citizen employees of the Panama Canal Commission were exempted from U.S. taxes, then it can remand the case to the Claims Court for a determination of what effect, if any, Section 1232(a) has on the outcome of these cases.[2] Moreover, the Claims Court would clearly

[1] Section 1232(a) provides:

"Nothing in the Panama Canal Treaty (or in any agreement implementing such Treaty) shall be construed as exempting (in whole or in part) any citizen or resident of the United States from any tax under the Internal Revenue Code of 1954 or 1986. The preceding sentence shall apply to all taxable years whether beginning before, on, or after the date of the enactment of this Act (or in the case of any tax not imposed with respect to a taxable year, to taxable events after the date of enactment of this Act)."

The Solicitor General also lodged copies of the portions of the House, Senate and Conference Reports relevant to Section 1232(a).

[2] If the Court holds that, contrary to the plain language of Article XV, the two nations only intended to exempt Panamanian taxes, then the Court would have no occasion to pass on the effect of Section 1232(a).

be a more appropriate forum for the parties to litigate due process claims petitioners would raise if the government would urge the Court to apply the provision retroactively. See page 6 *infra*.

At oral argument, the government's attorney discussed the relevant provision in the bill simply as an indication of what Congress now believes the Agreement provided. Of course, used in that way, the new statute is completely irrelevant. Statements of a subsequent Congress concerning the intent of previously enacted laws or treaties are entitled to no weight in interpreting the earlier law. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958).

It is, however, noteworthy that both the House and the Senate expressly acknowledged that the reading of the Agreement by the Eleventh Circuit in *Harris* v. *United States*, 768 F.2d 1240 (11th Cir. 1985), petition for cert. pending, No. 85-1011, which directly supports petitioners' interpretation, seemed to be consistent with the evidence before that court, which included everything before this Court except for the Panamanian Note. S. Rep. No. 99-313, 99th Cong., 2d Sess. 386 (1986); H.R. Rep. No. 99-426, 99th Cong., 1st Sess. 428 (1985). Thus, both Houses recognized the merit of the Eleventh Circuit's interpretation based on the language, structure and negotiating history of Article XV.

Congress, however, concluded that in light of the notorious diplomatic Note "Panama has confirmed the United States' explanation that the exemption was intended to apply solely to Panamanian taxes." S. Rep. No. 99-313, *supra* at 386; H.R. Rep. No. 99-426, *supra* at 427. But that Note, which the government refused to obtain or supply to the Claims Court, is entitled to no weight in

this litigation. *E.g.*, Pet. Reply Br. 11-16. Thus, Congress' construction of the Agreement, embodied in Section 1232(a), completely ignores the rules of interpretation that courts must follow.[3] Accordingly, as evidence of the meaning of the Agreement, Congress' recent action is simply beside the point.

2. If the Court feels obliged, because of the clear retroactive language used by Congress, to consider the effect of Section 1232(a) in this litigation, then it should declare the provision, literally read, to be an unconstitutional invasion by the legislative branch of powers reserved to the judiciary in the U.S. Const. Art. III.[4]

Article III vests all judicial power in this Court and all lower federal courts Congress chooses to create. Congress is invested with no judicial power and therefore can only restrict a federal court's power to exercise its judicial function by restricting its jurisdiction; Congress cannot dictate the outcome of specific cases. See *United States* v. *Klein*, 80 U.S. (8 Wall.) 128 (1871). Section 1232(a) purports to do *precisely* what this Court in *United States* v. *Klein* held was beyond Congress' legislative power. In *Klein*, this Court considered the effect of a congressional statute which declared "in substance that no pardon, . . . shall be admissible . . . to establish the right of any claimant to bring suit in that court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate

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[3] The only other material cited by the Reports is some of the legislative history in the Senate during the Treaty ratification process, which petitioners have already shown is wholly inadequate as a basis for disregarding the plain meaning of an international agreement. Pet. Reply Br. 7-8.

[4] Article III, Section 1 provides in pertinent part:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

court on appeal." *Id.* at 143. The Court struck down the law as applied and held that Congress could not "prescribe a rule for the decision of a cause in a particular way" without passing "the limit which separates the legislative from the judicial power." 80 U.S. at 146, 147. What made the statute particularly offensive was that it required the Court to decide the case before it in the government's favor. 80 U.S. at 147; *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 405 (1980).

This is exactly what Section 1232(a), if applied to this case, requires. The language of the statute could not be aimed more clearly at the judicial function; the Court is prohibited from "*construe[ing]*" the Agreement with Panama to provide any exemption from United States' taxes. Moreover, the legislative history plainly indicates that the Congress was fully aware of the on-going litigation. Indeed, the Senate expressly recognized "the litigation rights of persons under current law" and therefore proposed that Section 1232(a) be applied "only to future years." S. Rep. No. 99-313, *supra* at 387. Instead of disavowing the Agreement prospectively, which the Senate tried to do, Congress has attempted to dictate the outcome of this case and has done so to insure that the government wins this case and all others pending on this issue in the lower federal courts. Under *Klein*, this clearly violates Article III.[5]

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[5] Whether the constitutionally suspect sentence retroactively applying the provision should be severed from the first, which merely declares how the Agreement should be construed, depends upon Congress' intent. *See, e.g., Carter* v. *Carter Coal Co.*, 298 U.S. 238, 316 (1936). There is no evidence that Congress intended actually to abrogate the Agreement if it was misinterpreting it. Instead, the provision was described by both Houses as a "clarification." H.R. Rep. No. 99-426, *supra* at 428; S. Rep. No. 99-313, *supra* at 387.

Also, Congress has a much stronger financial interest in eliminating the exemption retroactively. Since 1979, the number of U.S. citizen employees has steadily dropped (a total reduction of 44.1%); no new U.S. citizens are being hired permanently and the remain-

3. Alternatively, Congress' attempt retroactively to abolish petitioners' rights created by an agreement with another country raises a serious due process issue. Clearly, under petitioners' interpretation of Article XV, Panama and the United States compromised and conferred upon petitioners and other U.S. employees of the Commission a bi-national exemption against income taxes for Commission-related work. While legislative action is presumed not to create contractual rights, the presumption is rebuttable. *Wisconsin & Mich. Ry. Co.* v. *Powers*, 191 U.S. 379, 386 (1903). There is certainly a serious question whether Congress can extinguish petitioners' rights under the Agreement, which are akin to the rights of a third party beneficiary to a contract, without a better reason than the government's unilateral desire to increase revenues. Unlike the Article III issue, however, the due process problem is a complicated one that would require additional factual development. Accordingly, the due process issue would necessarily require a remand to allow the Claims Court to evaluate fully, and in the first instance, the nature of petitioners' interests and the requirements of the Due Process Clause.

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ing U.S. citizens face certain termination from employment by the end of the century under the mandate of the Treaty. It therefore seems unlikely that Congress would add to the burden of these employees if it cannot eliminate the exemption retroactively.

CONCLUSION

For the reasons stated herein, the Court should decide these cases on the basis of Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty without regard to the recently enacted Section 1232(a) of the Tax Reform Act of 1986.

Respectfully submitted,

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